No. 90-5796

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JIMMIE BURDEN, JR.,

Petitioner,

v.

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX A

Burden v. Zant, 690 F.Supp. 1040 (M.D.Ga. 1988)

selections are insufficient to dispel a prima facie case of systematic exclusion." In other words, a mere denial of discriminatory intent will not suffice. This is not to say, however, that testimony alone is per se insufficient. We believe instead that testimony from the alleged discriminators should be viewed with a great deal of judicial scrutiny.

United States v. Perez-Hernandez, 672 F.2d 1380, 1387 (11th Cir.1982) (citations omitted).

[7] Out of the three jury commissioners who testified at the hearing, one stated that he made a specific attempt to include more black people on the jury list. The other two commissioners denied paying any attention to race and looked only at whether each person was an intelligent and upright citizen in accordance with the statute. One stated that they were instructed not to be biased. All three denied that they had excluded anyone because of their race. Nothing else was offered in rebuttal.

Respondent argues that if there was any abuse in the selection process it was in favor of putting blacks on the jury, not in excluding them. The statistics certainly do not bear this out and neither does the testimony of the jury commissioners.

There was very little testimony as to how the jury commissioners actually made their choices. They stated that they looked for intelligent and upright citizens but did not describe the criteria used to judge who was intelligent and upright. What the testimony of the commissioners boils down to is a denial of discrimination and an unsupported assertion that they followed the statute. This alone is insufficient to rebut the inference of discrimination. *Compare Perez-Hernandez*, 672 F.2d at 1387-88 (prima facie case rebutted by testimony concerning four specific factors used to judge who was qualified to serve as grand jury foreman).

Respondent has failed to rebut the prima facie case under the fair cross-section analysis as well. No evidence was presented to prove a significant governmental interest in the method of selection used by the commissioners.

VI. CONCLUSION

In accordance with the foregoing analysis it is the RECOMMENDATION of the Magistrate that the petition for habeas corpus relief herein be GRANTED. Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this RECOMMENDATION with the Honorable Wilbur D. Owens, Jr., United States District Judge, WITHIN TEN (10) DAYS after being served with a copy thereof.

SO RECOMMENDED, this 20th day of May, 1988.

Jimmie BURDEN, Jr., Petitioner,

v.

Walter ZANT, Warden, Respondent.

Civ. A. No. 88-6-3-MAC (WDO).

United States District Court,
M.D. Georgia,
Macon Division.

July 12, 1988.

Petitioner sought habeas corpus relief from murder convictions. The District Court, Owens, Chief Judge, held that: (1) public defender's representation of material witness after charges against witness had been dropped and after witness' attorney had resigned as public defender and had turned file over to defender was not ineffective assistance; (2) admission of bad acts evidence against petitioner did not deprive him of due process; and (3) evidence supported convictions and death sentence.

Petition denied.

1. Criminal Law ⇐641.13(1)

Claims of ineffective assistance must be reviewed from perspective of counsel

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and must take into account all circumstances of case as they are known to counsel at time in question and as they are reflected in record. U.S.C.A. Const.Amend. 6.

2. **Criminal Law** ⇐641.13(1)

Counsel owes criminal client duty to be loyal, to avoid conflicts of interest, to consult with client on important decisions, to keep client informed of important developments, and to bring to bear skill and knowledge rendering trial reliable, adversarial process. U.S.C.A. Const.Amend. 6.

3. **Criminal Law** ⇐641.5

Client seeking to establish ineffective assistance arising out of conflict of interest must demonstrate actual conflict of interest and adverse affect on adequacy of representation. U.S.C.A. Const.Amend. 6.

4. **Criminal Law** ⇐641.5(6)

Public defender's representation of material witness against client after charges against witness had been dropped and after witness' attorney had resigned as public defender and transferred file was not actual conflict of interest, did not adversely affect defendant's representation of client, and was not ineffective assistance; public defender never reviewed witness' file and had no need to do so; confidences gained by attorney during representation of witness were not divulged to defender; and defender acted as any other attorney in impeaching and cross-examining witness. U.S.C.A. Const.Amend. 6.

5. **Criminal Law** ⇐641.13(2)

Client failed to establish that challenge to racial composition of grand and traverse juries would have been meritorious and that attorney rendered ineffective assistance by failing to challenge juries. U.S.C.A. Const.Amend. 6.

6. **Constitutional Law** ⇐268(10)
Criminal Law ⇐369.2(1)

Admission of bad acts evidence that state court found relevant as matter of Georgia law did not deprive petitioner of fundamental fairness and did not violate due process. U.S.C.A. Const.Amends. 5, 14.

7. **Constitutional Law** ⇐268(10)

Overwhelming evidence of guilt defeated argument that bad acts evidence constituted crucial, critical, and highly significant factor in prosecution against petitioner and defeated claim that admission of evidence violated due process, even if evidence was inadmissible under Georgia law. U.S.C.A. Const.Amends. 5, 14.

8. **Constitutional Law** ⇐270(1)

Petitioner did not have due process right to have jury decide on concurrent or consecutive life sentences after Georgia Supreme Court had overruled decisions giving jury that power. U.S.C.A. Const.Amends. 5, 14.

9. **Homicide** ⇐250

Evidence supported state conviction of habeas corpus petitioner for murder of mother and her children; driver testified that he had dropped petitioner and victims off at road leading to pond and picked up petitioner after returning; and victims' bodies were recovered from pond. 28 U.S.C.A. § 2254.

10. **Homicide** ⇐354

Gruesome murder of child victims' mother by multiple blows to head, and gruesome murders of young children by drowning or strangulation supported death sentence of habeas corpus petitioner. 28 U.S.C.A. § 2254.

Millard Farmer, Atlanta, Ga., for petitioner.

Paula K. Smith, Atlanta, Ga., for respondent.

OWENS, Chief Judge:

On January 15, 1988, petitioner Jimmie Burden, Jr. filed this 28 U.S.C. § 2254 habeas petition attacking his convictions in the Superior Court of Washington County, Georgia, on four counts of murder, and also attacking the three death sentences and one life sentence that he received for committing these offenses. Petitioner was represented by able counsel, Joseph M. Nursey, Esq. and Millard C. Farmer, Esq. Because of this representation, the court's

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normal practice of appointing counsel was not necessary. The parties have thoroughly briefed the questions involved in petitioner's case, and after reviewing the entire record, the court is now prepared to render a decision on Mr. Burden's petition.

I. Procedural History

Upon a trial by jury that commenced on March 1, 1982, petitioner was found guilty on all four counts of murder. The jury found the existence of four statutory aggravating circumstances and sentenced petitioner to four death sentences pursuant to O.C.G.A. § 17-10-30(b)(2). On direct appeal, the Supreme Court of Georgia affirmed the four murder convictions, affirmed three of the four death sentences, but with respect to the death sentence imposed for the murder of Louise Wynn, found that her murder was "mutually supporting" the imposition of the death sentence for the other three murders, and, therefore, only a life sentence was appropriate on this count. *See Burden v. State*, 250 Ga. 313, 297 S.E.2d 242 (1982). The Supreme Court of the United States refused to grant certiorari to review this decision of the Georgia Supreme Court.

Petitioner filed his first petition for writ of habeas corpus on July 13, 1983, in the Superior Court of Butts County. An evidentiary hearing was held on October 24, 1983, at which time petitioner was afforded an opportunity to present evidence to support his petition. Millard L. Farmer, Esq., Joseph M. Nursey, Esq. and Kenneth Rose, Esq. assisted petitioner in presenting his case. Following this hearing a second evidentiary hearing was set for March, 1984. Before that hearing could be held, however, petitioner notified the state court, in a letter dated March 1, 1984, that he had no additional evidence, other than an additional affidavit, to present to the court. The matter was thereafter briefed by the parties, and the Superior Court of Butts County denied relief in an order dated September 5, 1984. This order was subsequently amended on September 20, 1984, to find that petitioner had procedurally defaulted under Georgia law in bringing his jury composition claim. On March 5, 1985, the Supreme Court of Georgia denied an application for a certificate of probable cause to appeal, and the Supreme Court of the United States again denied certiorari.

Petitioner then filed a second petition for writ of habeas corpus in the Butts County Superior Court, in which he raised a single claim, namely, that Georgia's death penalty statute was discriminatorily applied against black people and persons accused of killing white people. The state habeas court found this claim to be successive, and dismissed the petition. The Supreme Court of Georgia denied an application for a certificate of probable cause to appeal on March 11, 1987. Finally, petitioner has filed the instant petition asserting claims previously raised in both his direct appeal and in his first state habeas petition. Having exhausted his state remedies, these claims are ripe for review.

II. The Evidence

The court has read the entire trial transcript, the transcripts of the hearings held in the state court system, the briefs of the parties filed in both the state courts and in this court, and the various orders entered by the state courts affirming petitioner's convictions. After reviewing this information the court finds that the Georgia Supreme Court's description of the evidence against Mr. Burden in *Burden v. State*, 250 Ga. 313, 297 S.E.2d 242 (1982), accurately reflects what the evidence, viewed in the light most favorable to the prosecution, showed. It is, therefore, set out here as the court's *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), finding:

> On the evening of August 15 and morning of August 16, 1974, four bodies were recovered from Smith's Pond in Washington County, identified as Louise Wynn and her three children, ages 2, 3 and 4. The autopsies revealed that Louise Wynn died from multiple blows to the head; that Marvin, age 4, and James, age 2, died from drowning; and that Melinda, age 3, died from strangulation. Louise was clothed only in an undergarment and a dress torn in half. The crime scene

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revealed an area of disturbed pine straw, possibly evidencing a struggle. Investigators also discovered there an automobile lug wrench with what appeared to be bloodstains.

After extensive investigation, law enforcement officials were unable to fix upon a suspect, and the case was placed in the unsolved file some two years later. In late 1981, Henry Lee Dixon, a nephew of Burden, came forward with information leading to the arrest and indictment of this defendant.

Henry Lee Dixon testified that on August 13, 1974, Burden came to his house and asked to ride to town with him. He then directed Dixon to a liquor store where Burden purchased a case of beer and some liquor. Burden next directed Dixon to drive to Louise Wynn's house. Burden, who had been drinking heavily all the while, went into the house, and after about 15 minutes returned with two older children, followed by Louise Wynn, who was carrying a baby. Burden told Dixon to drive, while he continued to drink, kissing and hugging Louise Wynn in the back seat. Dixon was then directed to stop along a dirt road leading to Smith's Pond, where Burden and the four victims got out of the car. Burden took from his car a shotgun, fishing poles and bait, and told Dixon to return later to pick them up. When Dixon returned he saw Burden walking down the road, he stopped and asked where the others were. Burden first said that Louise became angry and had gone to her mother's house. After Dixon wanted to go and get Louise Wynn, Burden said "he had [messed] up," that she "didn't act right" and he "hit her side the head with something" and that "she fell in the pond or he throwed her in the pond one." Dixon then asked about the children, and Burden replied, "I reckon I damn well know where they are at, too." When Dixon suggested going back to the pond, Burden threatened him with a shotgun if he ever related the event to anyone.

The day after the bodies were discovered, Burden broke a pool cue over Dixon's head when he saw him talking with others, and again warned him not to mention the events of Tuesday.

Several witnesses testified that Burden and Louise Wynn were keeping social company with each other, having seen them together at various places just prior to Louise Wynn's death.

Two other witnesses testified as to physical assaults and attempted sexual assaults made upon them by Burden at times when he had been drinking. One such witness attributed to Burden the threat: "[H]e told me that he was going to throw me in a pond like he did somebody else."

See Burden, 250 Ga. 313–14, 297 S.E.2d 243–44.

III. Allegations of Error

Petitioner Burden has presented eight grounds for habeas relief. His eight allegations of error are: (1) that Mr. Burden's trial counsel maintained an actual conflict of interest in his representation of Mr. Burden; (2) that Mr. Burden was denied effective assistance of counsel; (3) that the grand and traverse jury pools from which a jury was drawn in Mr. Burden's case was unconstitutionally composed; (4) that the trial court unconstitutionally admitted evidence of wholly unrelated "bad acts" allegedly committed by the petitioner; (5) that the trial judge improperly deprived the jury of its authority to sentence Jimmie Burden to either concurrent or consecutive life sentences; (6) that prosecutorial misconduct rendered Jimmie Burden's sentences of death fundamentally unfair; (7) that there was insufficient evidence to support the guilty verdict; and (8) that the jury instructions at the penalty phase of Jimmie Burden's trial failed to adequately guide and focus the jury's consideration of mitigating circumstances. The first three of these allegations of error constitute a claim under the Sixth Amendment for effective assistance of counsel and will be dealt with together. The remaining allegations of error will thereafter be discussed separately.

A. Whether petitioner received effective assistance of counsel

[1, 2] In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

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(1984), the Supreme Court determined that the standard to be applied in determining whether a petitioner has received effective assistance of counsel is whether the attorney's performance was deficient *and* whether that deficient performance prejudiced the defense. *See Porter v. Wainwright*, 805 F.2d 930, 933 (11th Cir.1986), *cert. denied* — U.S. —, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987). Claims of ineffective assistance of counsel must be reviewed from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances were known to him at the time in question. *Id.* at 936 (quoting *Washington v. Watkins*, 655 F.2d 1346, 1356 (5th Cir.1981) (Unit A), *cert. denied*, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982)). This standard requires that the circumstances as known to petitioner's attorney at the time of the trial be reflected in the record. With respect to counsel's duty to avoid conflicts of interest, representation of the criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 346, 100 S.Ct. 1708, 1717, 64 L.Ed.2d 333 (1980). From counsel's function as assistant to the defendant derive the over arching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *See Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066.

[3] Conflicts of interest necessarily implicate a breach of counsel's duty of loyalty which is "perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067. To establish a Sixth Amendment violation, petitioner Burden must demonstrate that both an actual conflict of interest existed and that such conflict adversely affected the adequacy of Mr. Moses' representation. *Id. See also Smith v. White*, 815 F.2d 1401, 1404 (11th Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 181, 98 L.Ed.2d 133 (1987); *Porter v. Wainwright*, 805 F.2d 930, 939–40 (11th Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987); and *Stevenson v. Newsome*, 774 F.2d 1558, 1562 (11th Cir.1985), *cert. denied*, 475 U.S. 1089, 106 S.Ct. 1476, 89 L.Ed.2d 731 (1986).

The first question the court must answer then is whether or not Mr. Burden has demonstrated an actual conflict of interest. "A mere possibility of conflict of interest does not rise to a level of a Sixth Amendment violation." (citations omitted). *Smith v. White*, 815 F.2d at 1404. In *Stevenson v. Newsome*, the court of appeals quoted from *Barham v. United States*, 724 F.2d 1529, 1535 (11th Cir.1984), which stated:

> If a defense owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. Interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

[4] In this case petitioner has demonstrated that the Washington County Public Defender's Office was initially brought in to represent Mr. Dixon after he and Mr. Burden were charged with the murders of Ms. Wynne and her three children. At the time of their arrest, the Public Defender's Office of the Middle Judicial Circuit consisted of two attorneys, Mr. Ken Kondritzer and Mr. Mickey Moses. Mr. Kondritzer represented Mr. Dixon at the committal hearing held in his case. The result of this hearing was that the state court found insufficient evidence to bind Mr. Dixon over on the murder charges, but held him in jail under a material witness bond. It was shortly after this committal hearing that Mr. Kondritzer resigned as Public Defender for the circuit and Mr. Moses was appointed to replace him. Mr. Moses was, thus, given all of Mr. Kondritzer's files, which included Mr. Dixon's case. No charges were pending against Mr. Dixon at the time Mr. Moses was given Mr. Dixon's file. Acting in his role as chief public

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defender, Mr. Moses went on to defend Mr. Burden at trial.

Looking at the evidence presented by petitioner in the state habeas hearing, the court finds that he has failed to demonstrate either an actual conflict of interest or that this alleged conflict adversely affected the adequacy of Mr. Moses' representation of Mr. Burden. When Mr. Moses was appointed to take Mr. Kondritzer's place as chief public defender, he acceded to all of the files in the public defender's office, both pending and closed. Of course, Mr. Dixon had previously been represented by the public defender's office in Washington County, but at the time Mr. Moses took possession of Mr. Dixon's file, the charges against Mr. Dixon had already been dropped by court action. Petitioner has presented no evidence to show that Mr. Moses reviewed Mr. Dixon's file, nor was there any testimony to the effect that certain confidences gained by Mr. Kondritzer during his representation of Mr. Dixon had been, in any, way, divulged to Mr. Moses. Finally, Mr. Moses was under no obligation to take any action to represent Mr. Dixon in his status as a material witness that could be viewed as detrimental to his representation of Mr. Burden. In fact, at the time of Mr. Burden's trial, the charges against Mr. Dixon had already been dropped; Mr. Dixon, through no help of Mr. Moses, had been granted immunity from prosecution; and the decision to hold Mr. Dixon under a material witness bond had already been rendered. Mr. Moses, therefore, could take no action to harm Mr. Dixon, and was thus left unbridled in his defense of Mr. Burden. The court is simply not prepared to find that a public defender's office is absolutely barred from defending any criminal defendant in a criminal trial wherein a potentially adverse witness who has been represented earlier by some attorney in that office may be called to testify. Petitioner must set out additional conflict evidence before he would be entitled to succeed on this type of Sixth Amendment claim. Accordingly, because petitioner has failed to present evidence of an actual conflict, the court finds that there was no actual conflict to render Mr. Moses' performance ineffective.

Even if Mr. Moses was acting under a conflict of interest at the time of his representation of Mr. Burden, petitioner has failed to show that Mr. Moses failed to do something that an attorney not acting under a conflict would otherwise have done. Mr. Moses brought out evidence of Mr. Dixon's bad character; he inquired into the fact that Mr. Dixon had once been charged with the same crimes alleged against Mr. Burden, and that as a result of his testimony he was not going to be prosecuted; he cross-examined Mr. Dixon about being in custody under a material witness bond; he brought out prior inconsistent statements made by Mr. Dixon; and he generally attempted to discredit Mr. Dixon's testimony. The court perceives of no issues that were not brought out by Mr. Moses that another attorney might have developed. Absent some evidence of actual prejudice, this court cannot find ineffective assistance of counsel. *Smith*, 815 F.2d at 1404.

[5] The second allegation of ineffective assistance derives from Mr. Moses' failure to challenge the Washington County grand and traverse juries used to indict Mr. Burden. At the state evidentiary hearing, petitioner's only evidence of discrimination in the selection of the juries used in Washington County was an affidavit signed by Mr. Kondritzer stating that he found substantial discrepancies in the jury pools being utilized by Washington County during this time period. *See* Affidavit of Kenneth Kondritzer dated February 29, 1984. Mr. Moses and Mr. Malone, the District Attorney for the Middle Judicial Circuit of Georgia, on the other hand, testified that they were unaware of any particular problems with the jury pools used in Mr. Burden's case, that they generally kept abreast of the racial percentages being selected for jury duty, and that the percentages being chosen appeared generally to be in line with the relevant population statistics. No additional evidence was proffered to this court beyond the evidence presented in the state court.

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Before this court can find ineffective assistance in not bringing a jury challenge claim, the court must first find that such a challenge would have been successful. Mr. Farmer and Mr. Nursey have had significant experience in bringing jury challenges, yet they have made no independent effort in getting relevant statistical data beyond the conclusory affidavit of Mr. Kondritzer. While the court recognizes that the state refused to provide petitioner with unlimited funds to pursue his jury challenge claim, the court believes that there were alternative methods available to petitioner and his counsel that would have allowed him to develop facts necessary to support a jury challenge claim. The burden being on the petitioner to prove discrimination in the selection of the grand and traverse juries, the court is unwilling to presume discrimination in order to decide whether failure to bring such a claim was ineffective. Accordingly, the court refuses to find that by not bringing a jury challenge claim, Mr. Moses' representation was ineffective. Petitioner having failed to show that a jury challenge claim would have been meritorious, petitioner simply has not met his burden in making out such a claim.

Finally, the court has reviewed Mr. Moses' overall performance in Mr. Burden's trial and in the direct appeals taken by him, and finds that Mr. Moses' performance was more than adequate to satisfy the Sixth Amemdment's requirement of effective assistance of counsel. Petitioner has not shown any facts to support his claim that Mr. Moses' representation fell below an objective standard of reasonableness, nor has he shown any prejudice resulting to his defense as a result of this representation. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. Because he has utterly failed in proving these elements, petitioner's claim of ineffective assistance of counsel is totally without merit, and, therefore, must be denied.

B. Evidence of Bad Acts

Petitioner also contends that the trial court's introduction into evidence of certain bad acts allegedly committed by him was impermissibly prejudicial and denied him due process of law. In order to find a violation of petitioner's due process rights, evidentiary errors must be "of such magnitude as to deny fundamental fairness to the criminal trial, thus violating the due process clause." *See Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir.), *cert. denied*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976); and *Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir.1984), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). The district court must decide whether the evidence is "material in the sense of a crucial, critical highly significant factor." *See Hills*, 529 F.2d at 401; and *Osborne v. Wainwright*, 720 F.2d 1237, 1238–39 (11th Cir.1983). Overwhelming evidence of guilt defeats the argument that such evidence constitutes a "crucial, critical, highly significant factor," and if overwhelming evidence of guilt is shown, any constitutional error would simply be harmless. *See Rose v. Clark*, 478 U.S. 570, 576–79, 106 S.Ct. 3101, 3105–07, 92 L.Ed.2d 460, 469–71 (1986).

[6, 7] The state court has found that the introduction of the "bad acts" evidence was relevant as a matter of Georgia law, and this court cannot say that its admission denied Mr. Burden fundamental fairness under these circumstances. *See Jameson v. Wainwright*, 719 F.2d 1125, 1127 (11th Cir.1983), *cert. denied*, 466 U.S. 975, 104 S.Ct. 2355, 80 L.Ed.2d 827 (1984). Further, even if this evidence was admitted in violation of Georgia law, there was still no violation of due process. The overwhelming weight of the evidence of Mr. Burden's guilt defeats his argument that evidence of the assaults committed by him at a later date constituted a "crucial, critical, highly significant factor" in the case against him. Accordingly, because this court must view the evidence in the light most favorable to the prosecution, and because the evidence against Mr. Burden viewed in this light is overwhelmingly against him, the court must conclude that the introduction of these bad acts did not deprive petitioner of his right to due process of law.

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C. The trial judge's statement regarding concurrent or consecutive life sentences to the jury

[8] At the penalty phase of Jimmie Burden's trial, the trial judge instructed the jury that it had no say as to whether any life sentences imposed would run concurrently or consecutively. Petitioner contends that it was within the discretion of the jury to decide the question of whether Mr. Burden should be given concurrent or consecutive life sentences. He also cites certain Georgia law which states that a jury is authorized to decide whether the life sentences it imposes should run concurrently or consecutively. *See Anglin v. State*, 244 Ga. 1, 257 S.E.2d 513 (1979). The state has shown, though, that the Georgia Supreme Court's decisions supporting petitioner's contentions were based upon an erroneous application of the law, and that these cases were subsequently overruled in 1985. *See Welch v. State*, 254 Ga. 603, 331 S.E.2d 573 (1985). Petitioner contends that despite this subsequent action by the Georgia Supreme Court, the law in 1981 was that a jury could require either consecutive or concurrent life sentences to be served if mercy was recommended. In this court's opinion, however, the fact that the law was being applied improperly before 1985 should not give petitioner a due process claim to have it so applied in his case. Habeas relief on this ground, therefore, must be denied.

D. Prosecutorial misconduct

Petitioner argues that certain statements made in the sentencing phase of Jimmie Burden's trial were so egregious that it rendered the death sentences in his case fundamentally unfair. After reviewing the statements in question, the court finds that the remarks made were not sufficiently improper to warrant habeas relief. Taken as a whole they were not so egregious as to render the death sentences fundamentally unfair, thus, in violation of his right to due process. Petitioner's cited case of *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985), *cert. denied*, — U.S. —, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1986), does not require reversal of petitioner's convictions.

E. Insufficient evidence to support the guilty verdict

[9, 10] Viewing the evidence in the light most favorable to the prosecution, the court is persuaded that there was ample evidence to convict petitioner of the four murders involved in this case. Furthermore, the gruesome manner in which the victims were killed supports the sentences of death that he was given by the jury that found him guilty of committing those crimes. Accordingly, this allegation of error is also meritless.

F. The jury instructions—explanation of mitigating circumstances

After reviewing the instructions given on the issue of mitigation and considering the argument of the attorneys in this case, the court finds that there is no merit to petitioner's contentions that the instructions given in his trial were inadequate under the standards set out in *Peek v. Kemp*, 784 F.2d 1479, 1494 (11th Cir.1986), and *Spivey v. Zant*, 661 F.2d 464 (5th Cir.1981) (Unit B), *cert. denied*, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982). Finding no error, habeas relief must be denied on this final ground.

In conclusion, upon overwhelming evidence of guilt, this court finds that petitioner has been constitutionally convicted with effective assistance of counsel for the four murders he was charged with, and further finds that he was constitutionally sentenced to three death sentences and one life sentence for committing these offenses. His petition for writ of habeas corpus having been found meritless in all respects, is, therefore, DENIED in its entirety.

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APPENDIX B

Burden v. Zant, 871 F.2d 956 (11th Cir. 1989)

uori v. Alexander, 495 F.Supp. 641, 647 (S.D.N.Y.1980); Okla.Stat.Ann. tit. 12, § 1444.1 (1987). If plaintiff's own counsel did not perceive the possibility of a defamation claim until four years after the filing of the complaint, it is impossible for defendant to have gleaned from the complaint adequate notice of this theory of liability.

[5] Plaintiff next argues Fed.R.Civ.P. 15 requires that motions to amend be "freely and liberally granted," hence, the trial court abused its discretion by denying the motion. We review orders denying motions to amend under an abuse of discretion standard. *A.E. v. Mitchell*, 724 F.2d 864, 868–69 (10th Cir.1983). Because the action had been pending for over four years, through two sets of plaintiff's counsel and through lengthy discovery and legal maneuvering, we can find no abuse of discretion. *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C.Cir.1987). Because of our disposition of this case, we see no need to consider the other issues raised.

DISMISSED in part and AFFIRMED in part.

Jimmie BURDEN, Jr., Petitioner-Appellant,

v.

Walter ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellee.

No. 88-8619.

United States Court of Appeals, Eleventh Circuit.

April 10, 1989.

Defendant who had been convicted of murder by Georgia state court petitioned for federal habeas relief. The United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, No. CIV-88-6-3-MAC, denied petition, 690 F.Supp. 1040, and defendant appealed. The Court of Appeals, Vance, Circuit Judge, held that habeas petition would be remanded to district court for development of evidentiary record regarding possible conflict of interest on part of petitioner's trial counsel.

Remanded.

1. Criminal Law ⇐641.5

Defendant is entitled to representation that is free from conflict of interest. U.S. C.A. Const.Amend. 6.

2. Habeas Corpus ⇐864(7)

Habeas petition would be remanded to district court for development of evidentiary record regarding possible conflict of interest on part of petitioner's trial counsel, based on petitioner's preliminary showing that same public defender's office had represented both petitioner and state's witness in connection with same criminal offense.

Millard Farmer, Joseph M. Nursey, Atlanta, Ga., for plaintiff-appellant.

Paula K. Smith, Office of the Atty. General, Mary Beth Westmoreland, Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court For the Middle District of Georgia.

Before TJOFLAT, FAY and VANCE, Circuit Judges.

VANCE, Circuit Judge:

In December 1981 a grand jury indicted Jimmie Burden on four counts of murder for the 1974 deaths of Louise Wynn and her three children. Burden's nephew, Henry Lee "Acid" Dixon, implicated Burden in the murders after Dixon was arrested for the crimes following a seven year investigation. A jury found Burden guilty of all four murders and he was sentenced to death on each count. The Georgia Supreme Court affirmed the four convictions and three of the death sentences; the

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fourth was vacated and remanded for resentencing to life imprisonment. *Burden v. State*, 297 S.E.2d 242 (1982). The United States Supreme Court denied certiorari. *Burden v. Georgia*, 460 U.S. 1103, 103 S.Ct. 1803, 76 L.Ed.2d 367 (1983). After exhausting his state remedies, Burden filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia. The district court denied the petition, 690 F.Supp. 1040, and this appeal follows.

[1, 2] One of the most serious issues Burden raises in his appeal is whether his trial counsel labored under a conflict of interest. A criminal defendant is entitled under the sixth amendment to representation that is free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981). Because the record is inadequate to support resolution of this issue, we remand for an evidentiary hearing on petitioner's conflict of interest claim and express no opinion as to the other issues raised in his appeal.

The record reflects that the Public Defender's Office of Georgia's Middle Judicial Circuit was appointed to represent Dixon after his arrest in August 1981. Dixon, testifying at his commitment hearing under a grant of immunity, inculpated petitioner in the crimes for which Dixon was charged. The trial court did not find probable cause to bind Dixon over to the grand jury but ordered him to remain in custody as a material witness. After petitioner's arrest, the trial court appointed the same Public Defender's Office to represent petitioner. The Public Defender's Office at that time consisted solely of Kenneth Kondritzer, the Public Defender, and Mickey Moses, the Assistant Public Defender. In February 1982, before petitioner's trial, Kondritzer resigned and Moses became Public Defender. In an affidavit, Kondritzer states that he "continued to represent Henry Dixon until [he] left the Public Defenders' [sic] Office" despite the fact that the charges against Dixon had been dropped. Moses represented petitioner at trial.

The record leaves several important questions unanswered. It does not contain orders appointing either Kondritzer or Moses personally to represent Dixon and Burden; nor does it indicate which public defender, if either, negotiated Dixon's immunity agreement. It reveals little about the practices of the Public Defender's Office at the time Kondritzer was Public Defender and, specifically, nothing about Moses' relationship to individual cases in the office. Finally, it contains little information about the nature of Kondritzer's "continued representation" of Dixon after the trial judge declined to bind him over to the grand jury.

A comprehensive history of both Dixon's and Burden's representation is necessary for us to evaluate petitioner's conflict of interest claim. Accordingly, we retain jurisdiction of the case and remand it to the district court for an evidentiary hearing limited to the conflict of interest issue. The district court is requested to certify its findings and the record of its proceedings to us within ninety days of the issuance of this opinion. *See Walker v. Davis*, 840 F.2d 834, 839–40 (11th Cir.1988); *Green v. Zant*, 715 F.2d 551, 554 (11th Cir.1983).

REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH INSTRUCTIONS.

UNITED STATES of America, Plaintiff-Appellee,

v.

Michael RAPP, a/k/a Michael Hellerman, Charles J. Bazarian, Mario Renda, John A. Bodziak, Jr., William Smith, Defendants-Appellants.

No. 87-3180.

United States Court of Appeals, Eleventh Circuit.

April 27, 1989.

Defendants were convicted by jury in the United States District Court for the

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APPENDIX C

Burden v. Zant, C.A. 88-6-3-MAC (M.D. Ga. Sept. 20, 1989)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

Filed at 7:10 P M
SEP 20 1989
Elaine W. Jones
DEPUTY CLERK, U. S. DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA

JIMMIE BURDEN,
Petitioner,

vs.

WALTER ZANT, Warden,
Georgia Diagnostic and
Classification Center,
Respondent.

C. A. 88-6-3-MAC (WDO)

ORDER

On April 10, 1989, the United States Court of Appeals for the Eleventh Circuit remanded this 28 U.S.C. § 2254 death penalty state habeas case "for an evidentiary hearing on petitioner's conflict of interest claim."

On June 1, 1989, an evidentiary hearing on petitioner's conflict of interest claim was held. That hearing was transcribed and the parties then submitted proposed findings of fact and conclusions of law. All having been carefully considered, this court does hereby find the facts on this issue to be as follows.

Findings of Fact

Petitioner Jimmie Burden, Jr. was arrested on August 1, 1981, in Harrington, Delaware on a May 29, 1980, indictment from the Superior Court of Washington County, Georgia. The indictment charged that on May 8, 1980, petitioner burglarized the home of his sister, Willie Kate Dixon, in Tennille, Georgia. Petitioner was also arrested on a charge of interstate flight

to avoid prosecution. On August 3, 1981, petitioner was delivered to Georgia authorities and returned to Georgia. Respondent's Exhibit 1, p. 11 and Petitioner's June 30, 1989, filing, Tab 24.

At the time petitioner was returned to Washington County -- one of five counties (Candler, Emanuel, Jefferson, Toombs, and Washington) that make up the Middle Judicial Circuit -- indigent defendants were represented by a public defender, Kenneth Kondritzer, and an assistant public defender, Michael Moses, appointed pursuant to O.C.G.A. 17-12-7. Mr. Kondritzer was appointed on January 1, 1980, and Mr. Moses was appointed later that same year. The public defender's office, consisting of Mr. Kondritzer, Mr. Moses, and a secretary, was located in Louisville, Georgia. Mr. Kondritzer resided in Louisville, the northern part of the circuit, and Mr. Moses lived in Toombs County (Lyons), the southern end or part of the circuit; as a result Mr. Kondritzer and Mr. Moses "kind of divided the cases on a geographical basis." June 1, 1989, Transcript, p. 25. Mr. Kondritzer and Mr. Moses, according to now District Attorney Malone, each handled their own cases "independent of each other," and did not jointly try cases. June 1, 1989, Transcript, pp. 6, 7.

It was the responsibility of either Mr. Kondritzer or Mr. Moses to represent every indigent Middle Judicial Circuit defendant who desired counsel. While the judges, by letter, would sometimes request one of them to represent particular indigent defendants, orders appointing one of the public defenders to represent particular defendants were not entered.

Petitioner Jimmie Burden, Jr., an indigent, was represented by Public Defender Kenneth Kondritzer on the indicted charge of burglary after his return to Georgia on or about August 3. While the trial judge's report filed April 29, 1982 (Respondent's Exhibit 1, p. 47), indicates that as to the murder charges Public Defender Kondritzer began representing petitioner Burden on August 3, 1981, it is apparent that the trial judge in making that entry confused the two unrelated cases against petitioner -- burglary of his sister's home and murder of Ms. Wynn and her three children -- and in his murder case report entered the date on which Mr. Kondritzer began representing petitioner on the then only outstanding charge of burglary. Petitioner was not even charged by criminal warrants with the Wynn murders until September 15, 1981 -- six weeks later -- and not indicted for those murders until December 7, 1981 -- five months later. Public defender Kondritzer then must have begun representing petitioner on the only outstanding indictment of burglary on August 3, and sometime after warrants for murder were filed on September 15, 1981, have begun also representing petitioner on the charges of murder. The evidence does not indicate when that representation actually commenced. Since petitioner was already indicted and soon to be tried for burglary and was not even indicted for murder, Mr. Kondritzer most likely concentrated on petitioner's burglary case and waited until the murder indictment was returned on December 7, 1981, to begin work on that case.

The September 15, 1981, criminal warrants charging petitioner with the August 13, 1974, Wynn murders were based upon a statement

given to Chief Deputy Sheriff Mack Rogers by petitioner's nephew, Henry Lee Dixon. Based upon that statement, warrants also charging Henry Lee Dixon with murder were secured. Mr. Kondritzer as public defender had to represent Dixon. In doing so, Mr. Kondritzer obtained a committal hearing for Dixon which was held on November 19, 1981, in Washington County. Respondent's Exhibit A is a transcript of that hearing. Mr. Dixon was then incarcerated in Jefferson County, so Mr. Kondritzer waived his presence. The only witness was Chief Deputy Rogers who testified as to the statement given him by Henry Lee Dixon on September 15, 1981, at the Clarke County jail during an interview. The interview resulted from information received from an informant telling of Dixon having driven Jimmie Burden, Louise Wynn, and her children to a point near the pond where petitioner Jimmie Burden had allegedly killed Louise Wynn and her children. At the conclusion of Chief Deputy Rogers' testimony, the trial judge ruled that the state did not have probable cause to hold Henry Lee Dixon on a charge of murder, but did have sufficient evidence to hold him as a material witness. Bond was set at $50,000, and Henry Lee Dixon was held first until an indictment was returned against petitioner on December 7, 1981, and thereafter until petitioner was tried in March, 1982, for murder.

After the committal hearing Mr. Kondritzer had informal discussions with Chief Assistant District Attorney Malone which Mr. Kondritzer remembers resulting in "an understanding, you know, as long as he testfied, nothing would happen to him." June 1, 1989, Transcript, p. 28. Mr. Kondritzer saw Mr. Dixon

in jail and discussed his plight, and from time to time in response to his questions would tell Mr. Dixon what was going on.

According to Chief Assistant District Attorney Malone transactional immunity, if and when granted, was formally agreed to by the district attorney and all the parties. He has no recollection nor is there any other evidence of transactional immunity being granted to Henry Lee Dixon.

Mr. Dixon, during petitioner's murder trial, testified on cross-examination that he was promised immunity by Mr. Rogers and Mr. Boyd when he was interviewed in the Clarke County jail. Neither Mr. Dixon nor any other witness testified that Public Defender Kondritzer secured a promise of immunity for him.

On December 8, 1981, petitioner was tried and convicted for the May, 1980, burglary of his sister, Willie Kate Dixon's, house; he was represented by Public Defender Kondritzer. The burglary charges were totally unrelated to the murder charges; Henry Lee Dixon was not a witness in the burglary case.

On short notice, Public Defender Kondritzer resigned and left as of December 31, 1981, and Assistant Public Defender Michael Moses was appointed as public defender effective January 1, 1982. Prior thereto, Mr. Moses had not represented petitioner as to either his burglary charge or his murder charges; neither had Mr. Moses assisted Mr. Kondritzer in any way in his representation of petitioner. Mr. Moses also had not represented nor assisted Mr. Kondritzer in representing Henry Lee Dixon. June 1, 1989, Transcript, p. 55, et seq.

As public defender, Mr. Moses inherited petitioner's murder case and in the course of preparing it for trial interviewed Henry Lee Dixon for the first time. Respondent's Exhibit 1, p. 647 and June 1, 1989, Transcript, p. 55, et seq. Based upon that interview and a transcript of the November 19, 1981, committal hearing of Henry Lee Dixon, Public Defender Moses vigorously cross-examined Henry Lee Dixon when he testified against his uncle, petitioner Jimmie Burden. Respondent's Exhibit 1, pp. 647-687. At the conclusion of Henry Lee Dixon's testimony Public Defender Moses opposed the prosecutor's motion that Mr. Dixon's material witness warrant be dissolved, and the trial court agreed that Mr. Dixon should remain in custody as a material witness until the trial was completed. Respondent's Exhibit 1, p. 688.

Conclusions of Law

Petitioner Jimmie Burden, as to the charges of murdering Louise Wynn and her children, received representation by Public Defender Michael Moses free from conflicts of interest as guaranteed to him by the Sixth Amendment. Wood v. Georgia, 450 U.S. 261, 271 (1981).

SO ORDERED, this 20th day of September, 1989.

Wilbur D. Owens, Jr.
United States District Judge

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A P P E N D I X D

Burden v. Zant, 903 F.2d 1352 (11th Cir. 1990)

entitled to relief on his *Ake* claim, but I reach that conclusion for a different reason. Assuming, without deciding, that *Ake* should be applied retroactively, I would hold that the Constitution requires only that the defendant have *access* to a *competent* psychiatrist—not the *effective assistance* of a psychiatrist. Since Clisby made no showing that the psychiatrist to whom he had access was not competent, I would vacate the district court's grant of relief on the *Ake* claim.

The psychiatrist in this case was court-appointed. A court-appointed psychiatrist should be competent. If he is competent, then the inquiry ends. The fact that the assistance afforded by a court-appointed psychiatrist may be ineffective does not implicate constitutional concerns unless the State has in some way caused his assistance to be ineffective.

Clisby argues on appeal that he did not have access to effective psychiatric assistance. He thus attempts to cast his claim in terms of *access*, however, he really is attacking only the effectiveness of that assistance. Clisby does not argue that Dr. Callahan, the psychiatrist appointed at his request, was unqualified or incompetent. The district court did not find that Dr. Callahan was unqualified or incompetent, but rather that "... the *examination* by Dr. Callahan and the *testimony* he presented were inadequate to meet the requirements of *Ake*...."

I do not understand *Ake* to require the appointment of a psychiatrist who renders *effective* assistance. *Ake* speaks in terms of access to "competent psychiatric assistance." 470 U.S. at 77, 105 S.Ct. at 1093. It is *access* to an expert witness that is mandated; *Ake* says nothing about effective assistance by that expert witness. This circuit has not addressed the issue. I would hold that a defendant is entitled to a competent psychiatrist, that is, a qualified psychiatrist rather than the effective assistance of a psychiatrist. *See Waye v. Murray*, 884 F.2d 765 (4th Cir.1989). To reiterate, Clisby does not contend that he did not have access to a competent expert. If he were to make that argument, it would fail for lack of evidence in the record to support it. I would vacate the district court's grant of relief for this reason.

Jimmie BURDEN, Jr., Petitioner-Appellant,

v.

Walter ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent-Appellee.

No. 88-8619

United States Court of Appeals, Eleventh Circuit.

May 29, 1990.

Habeas petition was filed. The United States District Court for the Middle District of Georgia, 690 F.Supp. 1040, denied petition. Petitioner appealed. The Court of Appeals, 871 F.2d 956, remanded. The District Court, No. CIV-88-6-3-MAC, Wilbur D. Owens, Jr., Chief Judge, denied petition. Petitioner appealed. The Court of Appeals, Tjoflat, Chief Judge, held that: (1) petitioner was not denied effective assistance of counsel in state murder trial; (2) prosecutor's comments in closing argument at sentencing phase of state capital murder trial were not improper; and (3) jury instruction at penalty phase was adequate.

Affirmed.

1. Criminal Law ⇐641.5

Sixth Amendment right to effective assistance of counsel entails right to representation unimpaired by actual conflict of interest on part of defense counsel. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.13(1)

When analyzing ineffective assistance of counsel claim, Court of Appeals first asks whether counsel's performance, measured by professional norms prevailing at time, was deficient and, if so, whether deficient performance prejudiced defendant. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⇐641.5(3, 4)

In evaluating claim of ineffective assistance of counsel based on actual conflict of interest on part of defense counsel, inquiry is abbreviated and prejudice is presumed if—but only if—defendant demonstrates that counsel actively represented conflicting interests and that actual conflict of interest adversely affected lawyer's performance. U.S.C.A. Const.Amend. 6.

4. Criminal Law ⇐641.5(3, 7)

Defense counsel's multiple representation of defendants does not necessarily result in ineffective assistance of counsel based on actual conflict of interest; where defendant has not objected to counsel's representation of another, defendant still must show actual conflict and address effect of that conflict. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐641.5(6)

Public defender's representation of defendant and his nephew, who were being investigated for same murders, did not result in conflict of interest which rendered representation ineffective where public defender, while representing defendant, did not call nephew to stand at nephew's committal hearing and did not elicit testimony prejudicial to defendant; rather, charges against nephew were eventually dropped and potential conflict of interest never became actual. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐641.5(6)

Evidence did not support defendant's claim that his nephew, who was being investigated with defendant for murder, received grant of transactional immunity negotiated by public defender, who was representing both defendant and nephew, in exchange for nephew's testimony against defendant and, therefore, public defender's representation of both defendant and nephew did not result in conflict of interest which rendered counsel ineffective; impression of nephew that he would not be prosecuted as long as he testified did not establish grant of either formal or informal immunity. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.5(6)

There was no actual conflict of interest which rendered public defender ineffective when public defender representing defendant interviewed defendant's nephew, who was being investigated for same murder and who was represented by another public defender, where defendant's counsel did not represent nephew before or after departure of other public defender from office. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐641.13(1)

Standard for measuring deficient performance of defense counsel is an objective one: reasonableness under prevailing professional norms. U.S.C.A. Const.Amend. 6.

9. Criminal Law ⇐1144.10

Reviewing court's scrutiny of defense counsel's performance should be highly deferential. U.S.C.A. Const.Amend. 6.

10. Criminal Law ⇐641.13(4)

Inexperience of defense counsel does not constitute ineffectiveness per se: defendant who relies on allegations of counsel's inexperience in support of ineffective assistance of counsel claim must still make two-part showing of deficient performance and prejudice. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐641.13(6)

Fact that defense counsel did not interview all persons now suggested as potential witnesses did not mean that his investigation of murder was inadequate; defense counsel interviewed all of state's witnesses that he could locate, and it was evident that due to eight-year time lapse, faulty memories of those interviewed, and defendant's own inability to remember his whereabouts on day of murders, no alibi witnesses could be found by further investigation. U.S.C.A. Const.Amend. 6.

12. Criminal Law ⇐641.13(2)

Defense counsel's decision not to emphasize murder defendant's background because it was so similar to that of many persons in the area was a tactical decision and did not show that defense counsel was

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unaware of background information and did not establish ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

13. Criminal Law ⇐641.13(7)

Defense counsel's failure to present sympathetic character witnesses was not ineffective assistance of counsel; defense counsel decided at guilt phase of capital murder trial not to call character witnesses for fear that state would counter by presenting evidence of defendant's prior convictions, defense counsel chose at sentencing phase not to mention defendant's good behavior in prison because of risk that introduction of prison records would do more harm than good and, although defense counsel considered calling defendant's mother and sisters to present mitigating evidence at sentencing phase, he decided against the tactic on the basis that mother would not have a presentable witness and defendant had just been convicted of burglarizing home of one sister. U.S.C.A. Const.Amend. 6.

14. Criminal Law ⇐641.13(2)

Defendant failed to demonstrate that professional standards prevailing at time of his capital murder trial required defense counsel to challenge composition of jury pool and, accordingly, defendant failed to show ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

15. Habeas Corpus ⇐489

For state court evidentiary ruling to merit federal habeas corpus relief, ruling must have deprived petitioner of fundamental fairness, thereby depriving him due process of law. U.S.C.A. Const.Amends. 5, 14.

16. Constitutional Law ⇐266(4)
Criminal Law ⇐371(4, 12), 372(4)

Georgia state court ruling that extrinsic acts evidence, six or seven years after murder for which defendant was on trial, defendant violently assaulted two women when they refused to have intercourse with him and that defendant had been drinking heavily on those occasions, was admissible in murder prosecution did not render defendant's trial fundamentally unfair and did not deny him due process; there was rational connection between extrinsic acts evidence and murder which occurred after defendant had been drinking, after defendant had been kissing and hugging victim, and after defendant stated that victim had not been "acting right." U.S.C.A. Const. Amends. 5, 14.

17. Habeas Corpus ⇐497

Proper prosecutorial argument, no matter how prejudicial or persuasive, can never be unconstitutional, and even improper statements will not warrant habeas relief unless they render sentencing proceeding fundamentally unfair.

18. Criminal Law ⇐713, 723(1)

Prosecutor's reference in closing argument at sentencing phase of state capital murder trial to widespread publicity and community anger was not improper inasmuch as reference to widespread publicity was to a matter in evidence, and although there was no record evidence regarding community feeling, jurors were members of community and would know what community reaction to murders was.

19. Criminal Law ⇐723(5)

Prosecutor's reference in closing argument at sentencing phase of state capital murder trial to race of victims was not improper; race of victims was a matter of record evidence, record disclosed that prosecutor was arguing the absence of mitigating circumstances, and statement was an appeal to jury not to let itself be swayed by race of victims rather than an impermissible appeal to jury's sympathy for victims on account of their race.

20. Criminal Law ⇐723(1)

Prosecutor's statement in closing argument at sentencing phase of state capital murder trial referring to strength and courage of Americans, including those who had gone to war, in standing up to "forces of evil" was not improper; speech focused on deterrence which was legitimate justification for death penalty.

21. Constitutional Law ⇐266(7)

To satisfy constitutional requirement of due process in criminal trial, state must prove beyond a reasonable doubt every fact

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that constitutes essential element of crime charged against defendant. U.S.C.A. Const.Amends. 5, 14.

22. Criminal Law ⇐1159.2(7)

When considering sufficiency of evidence on review, proper inquiry is not whether reviewing court itself believes that evidence established guilt beyond a reasonable doubt but whether, after viewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of crime beyond a reasonable doubt.

23. Homicide ⇐250

Evidence was sufficient to sustain conviction for malice murder with respect to each victim; one victim died of multiple blows to head while two victims were drowned and one died from strangulation, there was evidence of struggle and according to testimony of defendant's nephew, the nephew had driven defendant who had been drinking heavily and victims to pond and left them there, and when he returned two hours later and found defendant alone, defendant replied that he hit one victim on head and that he knew where other victims were as well. O.C.G.A. § 16-5-1.

24. Homicide ⇐311

Jury instruction at penalty phase of state capital murder trial was adequate; charge fully apprised any reasonable juror of function of aggravating and mitigating circumstances, jury's role in evaluating mitigating circumstances, and its option to recommend against death penalty.

25. Homicide ⇐354(2), 358(1)

Constitution permits jury in murder prosecution to impose sentence of life imprisonment, even in the face of aggravating circumstances, and requires jury to consider any evidence in mitigation. U.S.C.A. Const.Amends. 8, 14.

Millard Farmer, Joseph M. Nursey, Atlanta, Ga., for petitioner-appellant.

Paula K. Smith, Office of the Atty. Gen., Mary Beth Westmoreland, Atlanta, Ga., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TJOFLAT, Chief Judge, FAY and VANCE*, Circuit Judges.

TJOFLAT, Chief Judge:

Petitioner, Jimmie Burden, Jr., is a Georgia prisoner convicted on four counts of murder and sentenced to death on three of those counts. After exhausting his remedies in the Georgia state courts, Burden filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, alleging *inter alia* that his trial counsel had a conflict of interest. The district court denied the petition, *see Burden v. Zant*, 690 F.Supp. 1040 (M.D.Ga.1988), and Burden appealed. Because the record did not permit this court to evaluate Burden's conflict of interest claim, we remanded the case for an evidentiary hearing on that issue alone. *See Burden v. Zant*, 871 F.2d 956 (11th Cir.1989). The district court held the evidentiary hearing, made factual findings, and again concluded that Burden had received representation of counsel untainted by conflict of interest. After considering all of Burden's claims, we affirm the district court's denial of Burden's petition for a writ of habeas corpus.

I.

On May 29, 1980, Burden was indicted in Washington County, Georgia, on a charge of burglarizing the home of his sister, Willie Kate Dixon. Burden was arrested on the burglary indictment on August 1, 1981, in Harrington, Delaware. He waived extradition proceedings, and on August 3, 1981, he was returned to Washington County where he was incarcerated pending trial on the burglary charge. He was convicted on that charge in December 1981.

* Judge Robert S. Vance was a member of the panel that heard oral argument but due to his death on December 16, 1989 did not participate in this decision. This case is decided by a quorum. *See* 28 U.S.C. § 46(d).

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On September 15, 1981, while Burden was awaiting trial on the burglary charge, his nephew, Henry Lee Dixon, gave a statement to the police implicating Burden in the unsolved 1974 murders of Louise Wynn and her three children. Based upon this statement, the state secured warrants charging both Dixon and Burden with the four murders. No indictment was ever returned against Dixon, however: at Dixon's preliminary hearing, the judge ruled that, while the state had sufficient evidence to hold Dixon as a material witness against Burden, it did not have probable cause to hold him for murder; the state never renewed the murder charges. An indictment was returned against Burden on December 7, 1981, charging him with four counts of malice murder. In March 1982, a Georgia jury found him guilty on each count, and after finding that a statutory aggravating circumstance existed, recommended that he be sentenced to death for each murder.[1] On direct appeal, the Georgia Supreme Court affirmed the four murder convictions and three of the death sentences but set aside one death sentence because the conviction for which that sentence was imposed was used as an aggravating circumstance to support the other three sentences. *See Burden v. State*, 250 Ga. 313, 297 S.E.2d 242, 245 (1982), *cert. denied*, 460 U.S. 1103, 103 S.Ct. 1803, 76 L.Ed.2d 367 (1983).

The district court adopted the Georgia Supreme Court's summary of the facts leading to Burden's conviction, and we reproduce that summary as follows:

> On the evening of August 15 and morning of August 16, 1974, four bodies were recovered from Smith's Pond in Washington County, identified as Louise Wynn and her three children, ages 2, 3, and 4. The autopsies revealed that Louise Wynn died from multiple blows to the head; that Marvin, age 4, and James, age 2, died from drowning; and that Melinda, age 3, died from strangulation. Louise was clothed only in an undergarment and a dress torn in half. The crime scene revealed an area of disturbed pine straw, possibly evidencing a struggle. Investigators also discovered there an automobile lug wrench with what appeared to be blood stains.
>
> After extensive investigation, law enforcement officials were unable to fix upon a suspect, and the case was placed in the unsolved file some two years later. In late 1981, Henry Lee Dixon, a nephew of Burden, came forward with information leading to the arrest and indictment of this defendant.
>
> ....
>
> Henry Lee Dixon testified that on August 13, 1974, Burden came to his house and asked to ride to town with him. He then directed Dixon to a liquor store where Burden purchased a case of beer and some liquor. Burden next directed Dixon to drive to Louise Wynn's house. Burden, who had been drinking heavily all the while, went into the house, and after about 15 minutes returned with two older children, followed by Louise Wynn, who was carrying a baby. Burden told Dixon to drive, while he continued to drink, kissing and hugging Louise Wynn in the back seat. Dixon was then directed to stop along a dirt road leading to Smith's Pond, where Burden and the four victims got out of the car. Burden took from his car a shotgun, fishing poles and bait, and told Dixon to return later to pick them up. When Dixon returned he saw Burden walking down the road, he stopped and asked where the others were. Burden first said that Louise became angry and had gone to her mother's house. After Dixon wanted to go and get Louise Wynn, Burden said "he had [messed] up," that she "didn't act right" and he "hit her side the head with something" and that "she fell in the pond or he throwed her in the pond one." Dixon then asked about the children and Burden replied, "I reckon I damn well know where they are at, too." When Dixon suggested going back to the pond, Burden threatened him with a shotgun if he ever related the event to anyone.

1. Under Georgia law, the jury's sentencing recommendation is binding on the trial court, which actually sentences the defendant. *See* Ga.Code Ann. § 17-10-31 (1982).

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> The day after the bodies were discovered, Burden broke a pool cue over Dixon's head when he saw him talking with others, and again warned him not to mention the events of Tuesday.
>
> Several witnesses testified that Burden and Louise Wynn were keeping social company with each other, having seen them together at various places just prior to Louise Wynn's death.
>
> Two other witnesses testified as to physical assaults and attempted sexual assaults made upon them by Burden at times when he had been drinking. One such witness attributed to Burden the threat: "[H]e told me that he was going to throw me in a pond like he did somebody else."

Burden v. State, 297 S.E.2d at 243-44.

In his petition for a writ of habeas corpus, Burden presents the following claims for relief: (1) due to his counsel's conflict of interest, he did not receive effective assistance of counsel, as guaranteed by the sixth, eighth, and fourteenth amendments to the United States Constitution; (2) the state trial court erred in admitting evidence of unrelated bad acts in violation of rights guaranteed by the sixth, eighth, and fourteenth amendments; (3) his trial counsel's failure to provide effective assistance violated his sixth, eighth, and fourteenth amendment rights; (4) prosecutorial misconduct rendered his trial fundamentally unfair and violated his sixth, eighth, and fourteenth amendment rights; (5) the evidence was not sufficient to support the verdict, in violation of his sixth, eighth, and fourteenth amendment rights; (6) the state trial court erred in giving an inadequate jury instruction on mitigating circumstances which violated his sixth, eighth, and fourteenth amendment rights; and (7) underrepresentation of blacks and women in the grand and traverse jury pools, from which his grand jury and petit jury were drawn, violated his sixth, eighth, and fourteenth amendment rights. Because Burden's first, third, and sixth claims involve the sixth amendment right to effective assistance of counsel, we consider them together.[2] We discuss the remaining claims separately.

II. Effective Assistance of Counsel

A.

Burden contends first that he has been denied the effective assistance of counsel because his counsel labored under a conflict of interest. He bases that contention on the allegedly simultaneous representa-

2. Burden brought the jury-composition claim for the first time in his state habeas action. Because Georgia law requires a criminal defendant to raise a challenge to jury lists at the time the jury is "put upon him," *see Young v. State*, 232 Ga. 285, 286, 206 S.E.2d 439, 442 (1974), and because Burden failed to show cause (and prejudice) so as to excuse the default, *see* Ga. Code Ann. § 9-14-42(b) (1982), the state habeas court ruled that the claim was procedurally defaulted. The court stated that Burden's allegation that his counsel was ineffective for failing to bring a jury-composition challenge was the only contention that might have satisfied the "cause" requirement and that the issue had already been decided against Burden.

Both in his petition to the district court below and in his appellate brief to this court, Burden repeated his jury-composition claim verbatim in his introductory statement of issues. He did not challenge the state court's ruling that the claim was procedurally defaulted, however, and his argument referred both the district court and this court to his ineffective-assistance-of-counsel claim for discussion of the allegedly unconstitutional jury composition.

Under federal habeas law, "[b]efore we can hear the merits of his jury composition challenge ..., [Burden] must show cause for his failure to raise the challenge before the trial court and actual prejudice from that failure." *Birt v. Montgomery*, 725 F.2d 587 (11th Cir.) (en banc) (citing *Francis v. Henderson*, 425 U.S. 536, 542, 96 S.Ct. 1708, 1711, 48 L.Ed.2d 149 (1976)), *cert. denied*, 469 U.S. 874, 105 S.Ct. 232, 83 L.Ed.2d 161 (1984); *see also Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). As in *Birt*, *Burden* "has presented only one arguably meritorious contention to satisfy the cause element of the *Francis v. Henderson* analysis; that is, that his trial counsel failed to investigate properly and timely challenge the [grand or] traverse jury composition and therefore rendered ineffective assistance of counsel." *Birt*, 725 F.2d at 597. Thus, Burden's contention that the jury pools were unconstitutionally composed collapses into his contention that his counsel rendered ineffective assistance by failing to bring a jury-composition challenge at the proper time. *See Lancaster v. Newsome*, 880 F.2d 362, 375-76 (11th Cir.1989); *Birt*, 725 F.2d at 597.

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tion of Burden and Henry Dixon by the public defender's office in general and by Burden's trial counsel in particular. When the case first came to this court, it became evident at oral argument that the record provided no answers to critical questions upon which the parties' arguments depended. For example, in his brief and at oral argument, Burden relied heavily on the assumption that his attorney, the public defender who was then representing both Burden and Dixon on the same murder charges, put Dixon on the stand at Dixon's committal hearing[3] and elicited testimony inculpating Burden. Burden also relied on the assumption that his attorney had negotiated and obtained transactional immunity for Dixon in exchange for Dixon's testimony against Burden. Furthermore, the practices of the two-person Public Defender's Office at the time of Burden's representation and the relationship of each attorney to Burden and to Dixon were not clear. The facts have now been sufficiently developed, both at the evidentiary hearing on remand and by supplementary filings, to permit us to resolve Burden's conflict-of-interest contention. After reviewing the elements of an ineffective-assistance-of-counsel claim based on conflict of interest, we set out those facts in some detail.

1.

[1-4] The sixth amendment right to the effective assistance of counsel entails the right to representation unimpaired by actual conflict of interest on the part of defense counsel. *See Cuyler v. Sullivan*, 446 U.S. 335, 349, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980); *Lightbourne v. Dugger*, 829 F.2d 1012, 1023 (11th Cir.1987), *cert. denied*, — U.S. —, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988). When analyzing an ineffective-assistance-of-counsel claim, we first ask whether counsel's performance, measured by professional norms prevailing at the time, was deficient and, if so, whether the deficient performance prejudiced the defendant. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). In evaluating such a claim based on an alleged conflict of interest, however, the inquiry is abbreviated and prejudice is presumed if—but only if—"the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067 (quoting *Cuyler*, 446 U.S. at 350, 348, 100 S.Ct. at 1719, 1718); *see Burger v. Kemp*, 483 U.S. 776, 783, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987). We note that multiple representation does not necessarily result in a constitutional violation: where the defendant has not objected to his counsel's representation of another, he must still show an actual conflict and the adverse effect of that conflict.

2.

[5] We now turn to the facts relevant to Burden's conflict-of-interest contention. Washington County is one of five counties that make up the Middle Judicial Circuit of Georgia. At the time Burden was returned to Washington County to face the burglary charge, indigent defendants in the circuit were represented by a public defender, Kenneth Kondritzer, and an assistant public defender, Michael Moses. Their representation of an indigent defendant would at times begin after a routine visit to the county jails to see if anyone there needed counsel; at other times, the judges would informally appoint the public defender's office to represent an indigent defendant at arraignment. Apparently the judges did not enter formal orders and did not designate either Kondritzer or Moses to represent particular defendants. Rather, Kondritzer and Moses divided the cases between them largely on a geographical basis, with Kondritzer taking the majority of cases in the northern part of the circuit, where Washington County is located, and Moses taking those in the southern part. Although the two attorneys shared an office and a secretary, they handled their cases independently of one another.

3. Under Georgia law, an accused being held in custody prior to indictment may demand a preliminary hearing, often termed a "committal hearing," for the purpose of determining whether there exists probable cause to believe that the accused committed the charged crime and, if so, whether the accused should be detained until a grand jury considers his case. *See* Ga.Code Ann. § 17-7-23(a) (1982); *First Nat'l Bank & Trust Co. v. State*, 137 Ga.App. 760, 224 S.E.2d 866, *aff'd*, 237 Ga. 112, 227 S.E.2d 20 (1976); *see also Fleming v. Kemp*, 748 F.2d 1435, 1439 n. 14 (11th Cir.1984), *cert. denied*, 475 U.S. 1058, 106 S.Ct. 1285, 89 L.Ed.2d 593 (1986).

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Kondritzer was appointed on or about August 3, 1981, to represent Burden on the burglary charge.[4] On September 15, 1981, the criminal warrants charging Burden with the Wynn murders were issued, and Burden was indicted on those charges on December 7, 1981, one day before his conviction for burglary. The criminal warrants charging Dixon with the same murders were also issued on or about September 15, 1981, and Kondritzer undertook Dixon's representation on or about the same date. Kondritzer testified at the evidentiary hearing in the district court that he could not remember how his representation of Dixon began. There is no doubt, however, that for some period of time Kondritzer himself was representing both Burden and Dixon. Whether Burden was aware at that time that Kondritzer was representing Dixon is unclear; it is clear, however, that he did not request the trial court or Kondritzer himself to put an end to the dual representation.

A committal hearing for Dixon was held on November 19, 1981 in Washington County. The committal hearing transcript, which evidently became available after the case was argued before us but before the district court's evidentiary hearing on remand, reveals that Dixon was incarcerated at the time in a different county and that Kondritzer waived his presence. The only witness at the hearing was Chief Deputy Sheriff Mack Rogers, to whom Dixon had made the statement inculpating Burden in the Wynn murders. The judge determined that there was not probable cause to hold Dixon for murder but offered to hold him as a material witness. The State made a verbal motion to that effect, and the judge granted the motion and set bond at $50,000. Dixon did not post bond and remained in custody until the close of Burden's trial.

Had the facts been as Burden originally presented them to us, we would have had no difficulty concluding that Kondritzer's representation of Dixon had required him to sacrifice Burden, reflecting an actual conflict and adversely affecting his representation of Burden. It is now apparent, however, that this serious allegation is factually incorrect: Kondritzer, while representing Burden, did not call Dixon to the stand and elicit testimony manifestly prejudicial to Burden. Kondritzer's representation of Dixon at Dixon's committal hearing consisted of brief cross-examination that in no way damaged Burden, argument that there was no probable cause to hold Dixon, and opposition to the material witness bond set to ensure Dixon's presence—*and testimony prejudicial to Burden*—at Burden's trial. Thus, while there was a potential conflict of interest—which no doubt would have materialized had Kondritzer *continued* to represent both Burden and Dixon—all charges against Dixon were dropped, and the conflict never became actual in the sense that Kondritzer's representation of Dixon's interests required him to compromise Burden's interests. *See Stevenson v. Newsome*, 774 F.2d 1558, 1562 (11th Cir. 1985), *cert. denied*, 475 U.S. 1089, 106 S.Ct. 1476, 89 L.Ed.2d 731 (1986).

[6] Similarly, the assumption that Dixon received a grant of transactional immunity, negotiated by Kondritzer and the prosecutor in exchange for Dixon's testimony against Burden, is without factual support. The source of Burden's impression that Dixon was granted immunity appears to have been Dixon's testimony at Burden's

4. The trial judge prepared a post-trial report, in keeping with Georgia's Unified Appeal Procedure established to protect a defendant's rights, reduce the possibility of error, and eliminate superfluous issues in death penalty cases, *see* Ga.Code Ann. § 17-10-36. The report indicated that Kondritzer began representing Burden on the *murder* charges on August 3, 1981, the date of Burden's return to Washington County under indictment for burglary. It is apparent that the trial judge confused the two unrelated cases: Burden was not then a suspect in the Wynn cases; he was not charged with the murders until September 15, 1981 and was not indicted on the murder charges until December 7, 1981.

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trial: under cross-examination, Dixon stated that two deputy sheriffs, interrogating him on the Wynn murders, had promised that he would not be prosecuted if he testified truthfully against Burden; Dixon stated that he understood, from these promises, that he had "immunity."[5] But according to then Chief Assistant District Attorney Richard Malone, who prosecuted Burden, transactional immunity, if and when granted to a witness, was the result of a formal, signed agreement between the district attorney, the witness, and the witness's attorney. There is no documentary evidence of any sort that attests to Dixon's having received immunity, and Malone testified at the district court evidentiary hearing that he did not recall any such agreement concerning Dixon. Furthermore, Malone remembered no negotiations with Kondritzer (or any other attorney) concerning immunity for Dixon. Kondritzer testified at the district court evidentiary hearing that, after the committal hearing, he had informal discussions with Malone, which Kondritzer remembered as resulting in his "understanding" that the State was not "really intereated in prosecuting Dixon" in connection with the Wynn deaths as long as Dixon testified against Burden. The impression of a witness that he would not be prosecuted as long as he testified does not establish a grant of immunity—formal or informal. And informal discussion that results in a defense attorney's understanding of the prosecution's current intentions is not negotiation of immunity. As the district court concluded, "there is [no] evidence of transactional immunity being granted to Henry Lee Dixon"; additionally, there is no evidence of any negotiations concerning immunity. Thus, Burden can no longer base his conflict-of-interest claim on the mistaken assumption that the attorney representing him obtained or attempted to obtain immunity for one client in exchange for testimony that was instrumental in the conviction of another.

[7] Burden further alleges, with respect to his conflict-of-interest claim, that his trial counsel, Moses, continued actively to represent Dixon while Dixon was being held as a material witness for the prosecution; he also argues that, even if Moses never actively represented Dixon, Kondritzer's representation of Dixon must be imputed to Moses as a member of the same public defender's office. We assume without deciding that two attorneys in the same public defender's office may be considered one attorney, *see Burger*, 483 U.S. at 783, 107 S.Ct. at 3120, and nonetheless perceive no actual conflict of interest adversely affecting Moses' performance.

The record developed at the evidentiary hearing indicates that Koodritzer, who represented Dixon while the murder charges were pending against him, resigned from the public defender's office in late December 1981, after Burden's burglary conviction and before his arraignment on the murder charges; we have already concluded that the potential conflict of interest lurking in Kondritzer's continued representation of Dixon and Burden on the same murder charges never materialized because the charges against Dixon were dropped. During the time that both attorneys were still in the public defender's office, Kondritzer and Moses did not jointly participate in either the Burden or the Dixon case. The district court found that up to the point of Kondritzer's departure "Mr. Moses had not represented petitioner as to either his burglary charge or his murder charges; neither had Mr. Moses assisted Mr. Kondritzer in any way in his representation of petitioner. Mr. Moses also had not represented nor assisted Mr. Kondritzer in representing Henry Lee Dixon." Nothing in the record causes us to question those findings.

Upon Kondritzer's departure, Moses became public defender and took over Burden's defense, a defense that required Moses to attack Dixon's testimony. The district court found that, in the course of preparing for Burden's murder trial, Moses interviewed Dixon—who was being held in county jail under the material witness bond—for the first time. Then, at trial, Moses vigorously cross-examined Dixon, based in part on that interview. At the conclusion of Dixon's testimony, Moses opposed the prosecutor's motion that the material witness warrant against Dixon be dissolved. Moses' conduct is consistent with his recollection, expressed in testimony at the evidentiary hearing in the district court, that he did not represent Dixon in any way. In holding that Moses did not labor under an actual conflict of interest, the district court implicitly found that Moses himself did not represent Dixon before *or after* Kondritzer's departure. There is nothing in the record to suggest the contrary.

Assuming that Kondritzer's past representation of Dixon is imputed to Moses, a conflict of interest arose, for "[a]n attorney who cross-examines a former client inherently encounters divided loyalties." *Lightbourne*, 829 F.2d at 1023. Given Moses' conduct, however, even if a conflict of interest arose from his representation of a client previously represented by the same public defender's office, *see id.* at 1024, we perceive no adverse effect upon his representation of Burden. The district court found that

> Mr. Moses brought out evidence of Dixon's bad character; he inquired into the fact that Mr. Dixon had once been charged with the same crimes alleged against Mr. Burden, and [Dixon's understanding] that as a result of his testimony he was not going to be prosecuted; he cross-examined Mr. Dixon about being in custody under a material witness bond; he brought out prior inconsistent statements made by Mr. Dixon; and he generally attempted to discredit Dixon's testimony.

Like the district court, we perceive no issues that were not brought out by Moses that another attorney might have developed. Accordingly, we reject Burden's contention that Moses' presumed conflict of interest, based on Kondritzer's previous representation of Dixon, adversely affected Moses' representation of Burden.

Because Burden has demonstrated no actual conflict of interest adversely affecting counsel's performance, we hold that no such conflict deprived him of the effective assistance of counsel.

B.

Burden also contends that he did not receive effective assistance of counsel because Moses was inexperienced, overworked, did not sufficiently investigate the case, did not present mitigating evidence at sentencing, and did not challenge the composition of the grand and traverse jury pools.

[8, 9] Under the familiar two-part inquiry into ineffective-assistance-of-counsel claims, we first ask whether counsel's performance was deficient. *See Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. If so, we then determine whether the deficient performance prejudiced the defendant. *Id.*, 104 S.Ct. at 2064. The standard for measuring deficient performance is an objective one: "reasonableness under prevailing professional norms." *Id.* at 688, 104 S.Ct. at 2065. Furthermore, a reviewing court's scrutiny of counsel's performance should be highly deferential. *Id.* at 689–90, 104 S.Ct. at 2065–66 (there is "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance"; defendant must overcome presumption that challenged action "might be considered sound trial strategy").

[10] We note first that inexperience does not constitute ineffectiveness per se: a defendant who relies on allegations of counsel's inexperience in support of an ineffective-assistance-of-counsel claim must still make the two-part showing of deficient performance and prejudice. *See United States v. Cronic*, 466 U.S. 648, 665, 104 S.Ct. 2039, 2050, 80 L.Ed.2d 657 (1984). After reviewing Moses' performance as Burden's attorney, we conclude that his representation of Burden did not fall below the objective standard of reasonableness articulated in *Strickland*.

[11, 12] Moses testified at the state habeas court's evidentiary hearing that he had adequate time to investigate Burden's case and to prepare his defense. That Moses did not interview all of the persons now

5. Dixon also stated that he did not really know what immunity meant.

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suggested as potential witnesses does not mean that his investigation was inadequate. Moses interviewed all of the state's witnesses that he could locate, the original investigating agents of the Georgia Bureau of Investigation and of Washington County, at least one of Burden's former employers, friends of Louise Wynn, and members of Burden's family, including his mother, grandmother, sisters, and a nephew. It was evident by then—due to the eight-year time lapse, faulty memories of those interviewed, and Burden's own inability to remember his whereabouts on the day of the murders—that no alibi witnesses could be found by further investigation. In the course of his investigation, Moses visited the home of Burden's grandmother several times. Contrary to Burden's assertion, Moses' investigation provided him with considerable information about Burden's upbringing and lack of education. Moses did not fail to present such evidence at the sentencing hearing because he was unaware of it; rather, according to Moses' testimony at the district court evidentiary hearing, he made a tactical decision not to emphasize Burden's background because it was so similar to that of many persons in the area.

[13] Burden also complains that Moses failed to present sympathetic character witnesses. At the guilt phase of the trial, Moses decided to call no character witnesses for fear that the State would counter by presenting evidence of Burden's prior convictions. At the sentencing phase, he chose not to mention Burden's good behavior in prison because of the risk that introduction of prison records would do more harm than good. Although he considered calling Burden's mother and sisters to present mitigating evidence at the sentencing phase, he decided against the tactic. He specifically recalled that Burden's mother would not have made a presentable witness. Further, Burden had just been convicted of burglarizing the home of one sister. Even assuming that the family would have testified sympathetically to Burden (which is not at all certain given the burglary and a violent sexual attack upon his sister, *see infra* part III), damaging information about the burglary conviction could have been revealed to the jury through cross-examination. Surely Moses' decisions with respect to calling witnesses and presenting evidence, based as they were on information gathered through considerable investigation, are the sort of judgment calls that *Strickland* cautions us not to second-guess.

[14] Finally, Burden contends that Moses rendered ineffective assistance by failing to challenge the 1981 Washington County grand and traverse jury pools from which his grand and traverse juries were drawn. As we have previously stated, however, "[t]he sixth amendment right to effective assistance of counsel does not require counsel to raise every objection without regard to its merits." *Palmes v. Wainwright*, 725 F.2d 1511, 1523 (11th Cir.), *cert. denied*, 469 U.S. 873, 105 S.Ct. 227, 83 L.Ed.2d 156 (1984). Moses testified at the state habeas corpus hearing that he did not consider a jury-composition challenge feasible at the time: he was familiar with the black-white ratios on the jury pools and considered them to be in line with the black-white ratio of the population at large. Malone, the prosecutor in Burden's case, confirmed this assessment, testifying that, although he had never figured exact percentages, he too remembered that the racial composition of the jury pools in 1981 generally approximated the racial composition of the population.

In support of his assertion that Moses should have challenged the composition of the jury pools, Burden presents an affidavit from Kondritzer stating that perceived discrepancies in the 1983 jury pools had prompted him to bring a challenge. Burden also attaches to his federal habeas petition a 1984 consent agreement, wherein Washington County jury commissioners agreed to revise the jury lists but did not admit discrimination, and a 1983 court order directing the county to revise its jury lists but specifically declining to find that the jury composition was discriminatory. These documents reveal that there were jury-composition disputes in 1983 and suggest, at best, that Moses might have generated a similar dispute in 1981. They do

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not, however, indicate that Moses would have succeeded nor that he made an unreasonable decision when he determined that such a challenge was not feasible. A reviewing court must evaluate counsel's performance based on what counsel knew or should have known at the time rather than on hindsight, *see Strickland*, 466 U.S. at 689–90, 104 S.Ct. at 2065–66. Burden has failed to demonstrate that professional standards prevailing at the time required Moses to challenge the composition of the 1981 jury pool.[6]

In sum, after reviewing Burden's allegations of ineffective assistance of counsel, we agree with the district court that Moses' representation of Burden did not fall below an objective standard of reasonableness.

III. Admission of Extrinsic-Acts Evidence

Burden contends that the trial court erred in admitting into evidence two "bad acts," unrelated to the offenses with which he was charged. The challenged evidence is the testimony of Willie Kate Dixon (Burden's sister) and Betty Jean Darrisaw (who had dated Burden at one time). After a hearing conducted outside the presence of the jury, each witness was allowed to testify that Burden had once violently assaulted her when she refused to have intercourse with him; Burden had been drinking heavily on both occasions. Each incident occurred some six or seven years after the murder of Louise Wynn. Before allowing the testimony of each witness, the trial court instructed the jury to consider it not as direct evidence of Burden's involvement in the Wynn murders but only insofar as it might show "motive or plan or scheme or bent of mind or course of conduct." Burden argues that the incidents were too distant in time and too dissimilar in circumstance to have any relevance with respect to motive, plan, scheme, bent of mind, or course of conduct.

[15, 16] For a state court evidentiary ruling to merit federal habeas corpus relief, the ruling must have deprived the petitioner of fundamental fairness, thereby denying him due process of law. *See Williams v. Kemp*, 846 F.2d 1276, 1281 (11th Cir.1988), *cert. denied*, — U.S. —, 110 S.Ct. 1836, 108 L.Ed.2d 965 (1990); *Jameson v. Wainwright*, 719 F.2d 1125, 1126 (11th Cir.1983), *cert. denied*, 466 U.S. 975, 104 S.Ct. 2355, 80 L.Ed.2d 827 (1984). We note preliminarily, that on direct appeal the Georgia Supreme Court expressly ruled that the evidence was relevant under Georgia law and was properly admitted,[7] *see Burden v. State*, 297 S.E.2d at 244, a state-law determination that this court must respect, *see Amadeo v. Kemp*, 816 F.2d 1502, 1504 (11th Cir.1987), *rev'd on other grounds sub nom. Amadeo v. Zant*, 486 U.S. 214, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988). Thus, Burden cannot complain that he was deprived of fundamental fairness by the trial court's erroneous application of state law.

The correctness of the ruling under Georgia law does not, of course, preclude this court from granting habeas corpus relief if the ruling was so fundamentally unfair as to deprive Burden of his federal

6. We note, furthermore, that even if we were to assume that a challenge to the composition of the traverse jury pool would have succeeded and would have made more black jurors available to serve at Burden's trial, Burden has not shown that Moses performed deficiently in deciding to proceed to trial without a challenge. Burden's brief to this court cites Moses as testifying that a jury with more black jurors would have been favorable to Burden, who is black himself. We have reviewed Moses' testimony, however, and it is obvious that Moses was making the general point that, given the jury's verdict and death sentence recommendation, *any* change in the actual jury selected could only have benefitted Burden. With respect to black jurors in particular, the prosecutor testified that at the time of the trial there was such great hostility toward Burden in the black community that he, the prosecutor, welcomed the presence of black persons on the jury.

7. After laying out the prerequisites for admitting evidence of independent crimes under state law, the Georgia Supreme Court held that, in Burden's case, "[t]he two transactions were sufficiently similar to show identity, motive, plan, scheme, bent of mind and course of conduct, and the trial court did not err in admitting testimony concerning them." *Burden v. State*, 297 S.E.2d at 244.

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constitutional right to the due process of law. *See Manning v. Rose*, 507 F.2d 889, 892 (6th Cir.1974). We do not, however, consider the admission of the extrinsic-acts evidence a violation of federal due process. We have construed the due process clause as "permitting the states wide latitude in fashioning rules of evidence." *Bassett v. Smith*, 464 F.2d 347, 351 (5th Cir.1972),[8] *cert. denied*, 410 U.S. 991, 93 S.Ct. 1509, 36 L.Ed.2d 190 (1973); *see Lisenba v. California*, 314 U.S. 219, 227, 62 S.Ct. 280, 286, 86 L.Ed. 166 (1941) ("Fourteenth Amendment leaves [a state] free to adopt a rule of relevance ..."). In *Lisenba*, where the petitioner claimed that the admission of testimony concerning the drowning of his former wife denied him due process of law in his trial on charges of drowning his later wife, the Supreme Court approved specifically the admission of extrinsic-acts evidence to show motive, plan, scheme, and course of conduct. *Id.*, 62 S.Ct. at 286. Although the extrinsic incident at issue in *Lisenba* did not result in a conviction or even in criminal charges, the Court sustained the state trial court's admission of the evidence because of "the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system." *Id.*, 62 S.Ct. at 286; *see United States v. Beechum*, 582 F.2d 898, 910 (5th Cir.1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979).

Burden correctly asserts that a state cannot adopt a rule of evidence that permits the introduction into evidence of *any* prior act with some bearing, however tenuous, on proof of motive, plan, scheme, bent of mind, or course of conduct. *See Manning*, 507 F.2d at 894 ("To be consistent with due process, the other crime must be 'rationally connected' with the charged crime."). Burden claims that the extrinsic acts admitted into evidence at his trial were too distant in time and too dissimilar in circumstance to be rationally connected to the Wynn murders. We disagree. Under both federal and Georgia law, a long lapse of time between the extrinsic act and the charged crime does not render the former inadmissible if the acts are sufficiently similar to establish the necessary rational connection. *See United States v. Terebecki*, 692 F.2d 1345, 1349 (11th Cir.1982); *Campbell v. State*, 234 Ga. 130, 214 S.E.2d 656, 658 (1975). In this case, the two witnesses testified that (1) Burden had been drinking heavily, (2) the assaults followed their refusal to have sexual relations with him, and (3) the assaults involved attempted rape. Dixon testified that Burden had been drinking heavily on the day of the Wynn murders and that Burden, who had been kissing and hugging Louise Wynn in the car, said later that Wynn "didn't act right." Louise Wynn's body was clad only in an undergarment and a dress torn in half and was surrounded by evidence of a struggle. There is a sufficient similarity between the Willie Dixon and Darrisaw incidents and the circumstances surrounding Louise Wynn's death to establish a rational connection tending to prove motive, bent of mind, or course of conduct. We therefore hold that the admission of the extrinsic-acts evidence did not render Burden's trial fundamentally unfair and thus did not deny him the due process of law.

IV. Prosecutorial Misconduct

Burden claims that certain statements made by the prosecutor in closing argument at the sentencing phase were so improper as to deprive him of due process. He alleges specifically that (1) in alluding to the widespread publicity and community anger engendered by the Wynn murders, the prosecutor referred to matters not in evidence and improperly attempted to incite the jury; (2) the prosecutor used the race of the victim to support his plea for a death sentence; and (3) the prosecutor made an improper appeal to the patriotism and bravery of the jury.[9]

8. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

9. Burden also complains that the prosecutor misled the jury, with respect to its duty to make a separate and specific finding of a statutory aggravating circumstance, by suggesting that because it had already found Burden guilty of the four murders, it had also found the aggravating circumstance of murder committed while engaged in the commission of another capital offense. We have reviewed the prosecutor's argument and find no such improper suggestion.

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[17] In *Brooks v. Kemp*, 762 F.2d 1383, 1400 (11th Cir.1985) (en banc), *vacated*, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), *reinstated on remand*, 809 F.2d 700 (11th Cir.) (en banc) (per curiam), *cert. denied*, 483 U.S. 1010, 107 S.Ct. 3240, 97 L.Ed.2d 744 (1987), this court articulated the standard for reviewing prosecutorial arguments made at the sentencing phase of a capital trial. *Proper* prosecutorial argument, "no matter how 'prejudicial' or 'persuasive,' can never be unconstitutional," *id.* at 1403, and even improper statements will not warrant habeas relief unless they render the sentencing proceeding fundamentally unfair, *id.* at 1400 (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974)); *see Williams*, 846 F.2d at 1283 (when making fundamental unfairness determination, court "ask[s] whether there is a 'reasonable probability' that, but for the prosecutor's offending remarks, the outcome of the sentencing hearing would have been different").

In this case, we do not reach the "fundamental unfairness" inquiry, because the prosecutorial statements challenged by Burden were not improper. We consider each statement in turn.

A. *Reference to Publicity and Community Anger*

[18] Contrary to Burden's assertion, the prosecutor's reference to widespread publicity was to a matter in evidence: Washington County Sheriff J. Euree Curry had testified that the case had been highly publicized. Although there was no record evidence regarding community feeling, the reference to community anger was permissible: the jurors were members of the community and would know what the community reaction was. *See Brooks*, 762 F.2d at 1408 ("Although there was no record evidence on the crime rate, the reference was acceptable because the increase in crime is 'within the common knowledge of all reasonable people.'" (quoting *Tenorio v. United States*, 390 F.2d 96, 99 (9th Cir.) (prosecutorial reference to destruction and waste caused by heroin use acceptable as common knowledge), *cert. denied*, 393 U.S. 874, 89 S.Ct. 169, 21 L.Ed.2d 145 (1968))). Thus we hold that neither reference was improper.

B. *Reference to the Victims' Race*

[19] Burden argues that the prosecutor improperly alluded to the race of the victims to support his request for the death penalty. Burden bases his challenge on the following remarks:

> A young black lady and three black children thrown into a pond. In times past, perhaps that would not have been quite as serious to a lot of people in this county. That's regrettable to have to say. Some people wouldn't have treated that very harshly in times past, and I find that, and I'm sure you do, repugnant.

Not every allusion to the race of the victim is improper, *see Brooks*, 762 F.2d at 1409 (prosecutorial mention of facts about victim, properly developed at trial, acceptable at sentencing; victim need not remain an abstraction). Rather, we must consider the context of the prosecutor's remark. *See id.* In this case, we note first that the race of the victims was a matter of record evidence. Second, the record discloses that the prosecutor was arguing the absence of mitigating circumstances. We agree with the State's assessment of the prosecutor's statement as an appeal to the jury *not to let itself be swayed by the race of the victims* rather than as an impermissible appeal to the jury's sympathy for the victims on account of their race. We hold that the reference to the race of the victims was not improper.

C. *Appeal to the Jury's Patriotism and Bravery*

[20] The prosecutor concluded his argument by reminding the jury of the strength and courage of Americans, including those who had gone to war, in standing up to

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"forces of evil." He urged the jury to do the same by selecting the death penalty and sending the message that Burden's crime would not be tolerated by this society. Burden argues that this statement compares a juror's duty to select the death penalty to a soldier's duty to kill the enemy, a comparison held to be impermissible in *Brooks*. *See id.* at 1412. We cannot agree. Unlike the "war on crime" speech decried in *Brooks* (where the prosecutor implied that the jury, like a soldier under orders to kill, had no choice but to select death), the prosecutor's speech in Burden's case focused on deterrence, which is a legitimate justification for the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 184–87, 96 S.Ct. 2909, 2930–31, 49 L.Ed.2d 859 (1976); *Brooks*, 762 F.2d at 1412 ("Arguments about general or special deterrence may be considered by the jury.").

In sum, we agree with the district court that the challenged prosecutorial statements do not warrant habeas relief.

V. Insufficient Evidence

[21–23] Burden claims that there was insufficient evidence to support his conviction and that his right to due process was therefore violated. To satisfy the constitutional requirement of due process in a criminal trial, the state must prove beyond a reasonable doubt every fact that constitutes an essential element of the crime charged against the defendant. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). When considering the sufficiency of the evidence on review, the proper inquiry is not whether the reviewing court itself believes that the evidence established guilt beyond a reasonable doubt but "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original).

The elements of malice murder, with which Burden was charged, are as follows:

> (a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.
>
> (b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

Ga.Code Ann. § 16–5–1 (1982).

The following evidence was adduced at Burden's trial. Louise Wynn died of multiple blows to the head. Two of the children were drowned, and one died from strangulation. There was evidence of a struggle. According to the testimony of Henry Dixon, Dixon drove Burden, who had been drinking heavily, and the four victims to a pond and left them there. He returned two hours later and found Burden alone, walking away from the pond. When questioned about the others, Burden replied that he had "f—ed up," had hit Louise Wynn on the head, and that she had fallen in the pond or that he had thrown her in. Burden added that he knew where her children were as well. He warned Dixon not to mention these events, threatening Dixon first with a shotgun, then breaking a pool cue over Dixon's head several days later when he saw Dixon talking to others. Three other witnesses testified that Burden and Louise Wynn had been dating and that they had seen Louise Wynn beaten during that period. Two witnesses testified that they had been violently assaulted by Burden, who was intoxicated on each occasion, after they had refused to have sex with him; one of these witnesses also testified that Burden had threatened her and told her that he would throw her into a pond as he had thrown someone else. Reviewing this evidence in the light most favorable to the prosecution, we are satisfied that it was sufficient to permit a rational trier of fact to find beyond a reasonable doubt, with respect to each victim, all elements constituting the crime of malice murder.

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VI. Improper Jury Instruction

[24] Burden claims that the jury instruction at the penalty phase of his trial failed to guide and focus the jury's consideration of mitigating circumstances, as required by the eighth and fourteenth amendments. Burden relies on *Moore v. Kemp*, 809 F.2d 702, 731 (11th Cir.) (en banc) (eighth and fourteenth amendments require trial court to instruct jury clearly and explicitly on mitigating circumstances and on jury's option to recommend against death penalty), *cert. denied*, 481 U.S. 1054, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987), and on *Peek v. Kemp*, 784 F.2d 1479 (11th Cir.) (en banc), *cert. denied*, 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 371 (1986), where this court considered the adequacy of a jury instruction on mitigating circumstances. We explained in *Peek*, however, that the focus of a reviewing court's inquiry is "whether there is a reasonable possibility that the jury understood the instructions in an unconstitutional manner," *id.* at 1489 (citing *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)), and we held that an instruction on mitigation is constitutionally sufficient "if it is clear from the entire charge considered in context that a reasonable jury could not have misunderstood the nature and function of mitigating circumstances," *id.* at 1494.

[25] The Constitution permits a jury to impose a sentence of life imprisonment even in the face of aggravating circumstances, *see Gregg v. Georgia*, 428 U.S. at 197–98, 96 S.Ct. at 2936–37, and requires a jury to consider *any* evidence in mitigation, *see Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). After reviewing the entire charge given to the jury at the sentencing phase of Burden's trial, we are satisfied that it would fully apprise any reasonable juror of the function of aggravating and mitigating circumstances, the jury's role in evaluating mitigating circumstances, and its option to recommend against the death penalty.[10] We therefore reject Burden's contention that the instruction was constitutionally inadequate.

VII.

For the foregoing reasons, the district court's denial of the petition for a writ of habeas corpus is

AFFIRMED.

10. The trial court told the jury it was to consider each of the four murders separately, and the court read the statutory aggravating circumstance (*to wit:* defendant committed the murder while engaged in the commission of another capital felony) sought by the State in connection with each murder. The court then informed the jury as follows:

> Now, members of the jury, even if you find beyond a reasonable doubt that the State has proven the existence of the circumstance in each murder, ... you nonetheless are not required to recommend that the accused be put to death for that murder.
>
> You shall consider any mitigating circumstances. Mitigating circumstances are those circumstances which in fairness and mercy shall be considered by you in fixing punishment.
>
> You may, if you see fit, and this is a matter entirely within your discretion, provide for a life sentence for the accused in any or all murders based upon any mitigating circumstance or reason satisfactory to you, or without any reason, if you see fit to do so. You may recommend life imprisonment even though you have found the aggravating circumstance given to you in this charge for each murder to have existed beyond a reasonable doubt.
>
> The sentences to be imposed in these cases are a matter entirely within your discretion. You may provide for life sentences for this accused for any reason that is satisfactory to you or without any reason if you care to do so.... You may find the aggravating circumstance in your opinion is sufficiently substantial to call for the imposition of the death penalty and even so your verdicts may be for a life imprisonment.

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APPENDIX E

September 5, 1990

Order denying rehearing

THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-8619

JIMMIE BURDEN, JR.,

Petitioner-Appellant,

versus

WALTER ZANT, Warden, Georgia Diagnostic and Classification Center,

Respondent-Appellee.

On Appeal from the United States District Court for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion May 29, 1990, 11th Cir., 198__, ____F.2d____).

(SEP 5 1990)

Before: TJOFLAT, Chief Judge, FAY and VANCE*, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

CHIEF JUDGE

*Judge Robert S. Vance was a member of the panel that heard oral argument but due to his death on December 16, 1989 did not participate in this decision. This case is decided by a quorum. See 28 U.S.C. § 46(d).

Appendix E

ORD-..

A P P E N D I X F

Trial Judge's Mandatory Post-Trial Report

State v. Burden, Superior Court of Washington County,
State of Georgia

of the

Superior Court of Washington County, Georgia

The State vs. Jimmy Burden, Jr.
(A case in which the death penalty was imposed)

A. Data Concerning the Defendant

1. Name: Burden (Last) Jimmy (First) Jr. (Middle) 2. Date of Birth 10-[illegible]-41 (No. Day Year)

Social Security Number 254 70 0436
Sex M [ ] F [ ]
5. Marital Status: Never Married [ ]
Married [ ]
Divorced [x]
Spouse Deceased [ ]

Children
(a) Number of children none
(b) Ages of children: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
(Circle age of each child)

Father living: Yes [ ] No [x] If deceased, give date of death 1953 or 54
Mother living: Yes [x] No [ ] If deceased, give date of death N/A
Number of children born to parents _____
Education--Highest Grade Completed: 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17
(Circle one) [college]

Intelligence Level: (IQ below 70) Low [ ]
(IQ 70 to 100) Medium [ ]
(IQ above 100) High [ ]

Psychiatric Evaluation Performed: Yes [x] No [ ]
If performed is defendant:
a. Able to distinguish right from wrong? [x] [ ]
b. Able to adhere to the right? [x] [ ]
c. Able to cooperate intelligently in his own defense? [x] [ ]
If examined, were character or behavior disorders found? Yes [ ] No [ ]
(If answer is yes, please elaborate)

Unknown

What other pertinent psychiatric [and psychological] information was revealed?

~~Unknown~~ The defendant was evaluated by Central State Hospital and the report is on file in the Clerk's Office.

Prior work record of defendant:

	Type Job	Pay	Dates Held	Reason for Termination
a.	Strates Shows (circus)	$175 week	1980-1981	incarcerated
b.	Earl Ivey (logger)	Unknown	1975-	Sentenced to prison
c.	" "		1979-	Own business
d.				
e.				

*A separate report must be submitted for each defendant sentenced to death.

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[redacted] was tried with or without jury.

How did the defendant plead? Guilty [ ] Not guilty [x]

C. Offense Related Data

Capital Offense for Which Penalty Imposed:

a. Treason . . . . . [ ]
b. Murder . . . . . [x]
c. Kidnapping for Ransom . . . . . [ ]
d. Kidnapping where Injury Results . . [ ]
e. Aircraft Hijacking. . . . . [ ]
f. Rape . . . . . [ ]
g. Armed Robbery . . . . . [ ]

Were other offenses tried in the same trial? yes [x] no [ ]

If other offenses were tried in the same trial list those offenses.

a. Murder of Marvin J. Wynn

b. Murder of James Lamar Wynn

c. Murder of Melinda Cleo Wynn

d. Murder of Louise Wynn

If tried with jury, did the jury recommend the death sentence?
Yes [x] No [ ]

Statutory aggravating circumstances found: Yes [x] No [ ]

Which of the following statutory aggravating circumstances were instructed and which were found?

		Instructed	Found
a.	(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or (2) The offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.	[ ]	[ ]
b.	(1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery or (2) The offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.	[x]	[x]
c.	The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.	[ ]	[ ]

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d.	The offender committed the offense himself or another, for the purpose of receiving money or any other thing of monetary value.	[ ]	[ ]
e.	The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.	[ ]	[ ]
f.	The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.	[ ]	[ ]
g.	The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.	[ ]	[ ]
h.	The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.	[ ]	[ ]
i.	The offense of murder was committed by a person in, or who has escaped from the lawful custody of a peace officer or place of lawful confinement.	[ ]	[ ]
j.	The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.	[ ]	[ ]

List nonstatutory aggravating circumstances indicated by the evidence, if any.

a. History of violence toward women(motive, scheme and design)

b. _____

c. _____

d. _____

Was there evidence of mitigating circumstances? Yes [ ] No [x]

If so, which of the following mitigating circumstances was in evidence?

a.	The defendant has no significant history of prior criminal activity.	[ ]
b.	The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.	[ ]
c.	The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.	[ ]
d.	The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.	[ ]
e.	The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.	[ ]

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demination of another person.

i. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. [ ]

h. The youth of the defendant at the time of the crime. [ ]

i. Other.
Please explain if (i) is checked _____

Defendant was probably in a state of intoxication (x)

_____

If tried with a jury, was the jury instructed to consider mitigating circumstances? Yes [✓] No [ ]
~~Only to consider all mitigating circumstances~~ Wrong

Does the defendant's physical or mental condition call for special consideration? Yes [ ] No [x]

Although the evidence suffices to sustain the verdict, does it foreclose all doubt respecting the defendant's guilt? Yes [ ] No [x]

Was the victim related by blood or marriage to defendant? Yes [ ] No [x]

If answer is yes, what was the relationship? _____

_____

_____

Was the victim an employer or employee of defendant? No [x]
Employer [ ]
Employee [ ]

Was the victim acquainted with the defendant? No [ ]
This was one of the issues of the trial. Casual Acquaintance [ ] ?
<--- Wrong Friend [ ]

Was the victim local resident or transient in the community? Resident [x]
Transient [ ]

Was the victim the same race as defendant? Yes [x] No [ ]

Was the victim the same sex as the defendant? Yes [ ], No [x]

Was the victim held hostage during the crime? No [x]
Yes - Less than an hour [ ]
Yes - More than an hour [ ]

Was the victim's reputation in the community: Good [ ]
Bad [x]
Unknown [ ]

Was the victim physically harmed or tortured? Yes [x] No [ ]
If yes, state extent of harm or torture: One victim was beat about the head with an object - one child may have been strangled - the two smaller children may not have been physically abused prior to drowning.

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If a weapon was used in commission of the crime was it?
other three victims - No weapon used [x]
Poison [ ]
Motor Vehicle [ ]
Louise Wynn - Blunt Instrument [x]
Sharp Instrument [ ]
Firearm [ ]
Other _____ [ ]

_____

Does the defendant have a record of prior convictions? Yes [x] No [ ]

If answer is yes, list the offenses, the dates of the offenses and the sentences imposed? (See copy of presentence report)

Offense	Date of Offense	Sentence Imposed
a. Burglary	1976	5 years
b. Perjury	1978	7 years probation
c. Burglary	1981	12 years
d.		

Was there evidence the defendant was under the influence of narcotics or dangerous drugs at the time of the offense? Yes [x] No [ ]

Was the defendant a local resident or transient in the community?
Resident [x]
Transient [ ]

D. Representation of Defendant *

Date counsel secured August 3, 1981

How was counsel secured? a. Retained by defendant [ ]
b. Appointed by Court [x]

If counsel was appointed by court was it because
a. Defendant unable to afford counsel? [x]
b. Defendant refused to secure counsel? [ ]
c. Other (explain) _____

_____

_____

How many years has counsel practiced law? a. 0 to 5 [x]
b. 5 to 10 [ ]
c. over ten [ ]

What is the nature of counsel's practice? a. Mostly civil [ ]
b. General [ ]
c. Mostly criminal [x]

Did the same counsel serve throughout the trial? Yes [x] No [ ]

If not, explain in detail Public Defender's Office was appointed soon after Defendant's apprehension - Defendant was initially represented by Kenneth Boudreaux of the Public Defender's Office.

(If more than one counsel served answer the above questions as to each counsel and attach to this report.)

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solicitation for the Public Defender's office

E. Original Conviction

Was race affecting the defense as an issue in the trial? Yes [ ] No [x]

Did race otherwise appear as an issue in the trial? Yes [ ] No [x]

What percentage of the population of your county is the same race as the defendant?

a. Under 10% . . . . . [ ]
b. 10 to 25% . . . . . [ ]
c. 25 to 50% . . . . . [ ]
d. 50 to 75% . . . . . [x]
e. 75 to 90% . . . . . [ ]
f. Over 90% . . . . . [ ]

Were members of defendant's race represented on the jury? Yes [x] No [ ]

If not, was there any evidence they were systematically excluded from the jury?
Yes [ ] No [ ]

Was the jury instructed to exclude race as an issue? Yes [ ] No [x]

Was there extensive publicity in the community concerning this case?
Yes [x] No [ ]

Was the jury instructed to disregard such publicity? Yes [x] No [ ]

Was the jury instructed to avoid any influence of passion, prejudice, or any other arbitrary factor when imposing sentence?
Yes [ ] No [x]

Was there any evidence that the jury was influenced by passion, prejudice, or any other arbitrary factor when imposing sentence?
Yes [ ] No [x]

If answer is yes, what was that evidence? _____

In your opinion, was the death sentence imposed in this case appropriate?
Yes [X] No [ ]

General comments concerning your answer: SEE ATTACHMENT

F. Chronology of Case

		Elapsed Days
Date of Offense	13 August, 1974	
Date of Arrest	2 August, 1981	
Guilt Trial Began	1 March, 1982	
Guilt/Sentence Imposed	4 March, 1982	

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Date guilt trial was ended on N/A

Date Trial Judge's Report Completed April 29, 1982

*Date received by Supreme Court _____

*Date sentence review completed _____

*Total elapsed days _____

*To be completed by Supreme Court

This report was submitted to the defendant's counsel for such comments as he desired to make concerning the factual accuracy of the report, and

1. His comments are attached * See Below
2. He stated he had no comments ( )
3. He has not responded ( )

April 29, 1982
Date

Judge, Superior Court of
Washington County

* The Defendant's Attorney declined. Obtain much of the information contained in this report.

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Question E-12.

The witness most damaging to the defendant's case was Henry Lee Dixon. He is the defendant's nephew. Dixon stated that he carried Burden, his girlfriend and her three children to a point near Smith's Pond. That was the last time the victim and her three victim children were seen alive. Burden allegedly told Dixon that he had killed all four victims. Additionally, two women testified that Burden made sexual advances toward them in a violent way. One woman allegedly assaulted is Willie Kate Dixon, Burden's sister, and Henry Lee Dixon's mother. The other woman, Betty Jean Darrisaw allegedly lived with Burden for several months.

Burden denied knowing the victim and her three small children other than in a very casual way. There were several witnesses who testified that Burden may very well have been Louise Wynn's lover. It was suggested that Louise Wynn may have attempted to terminate their relationship causing Burden's temper outburst resulting in these violent acts. A similar circumstance existed in Burden's relationship with Betty Jean Darrisaw, who was physically abused as mentioned above.

The jury was composed of substantial citizens. Obviously, the jur believed beyond a reasonable doubt that Burden was guilty of killing all four individuals. As noted in this questionnaire the three children victims were 5, 3 and 2 years of age. The evidence did not indicate and it would appear obvious that these children of tender age could not have made a violent attack upon the defendant. Since the jury believed Burden killed all four victims in cold blood it would appear also that they believed the death penalty was warranted.

There were no eye witnesses to the alleged criminal acts. The State's case depended primarily upon the testimony and credibility of Henry Lee Dixon which was corroborated by Burden's potential for violence. The State felt that it was necessary to keep Dixon under a $50,000 material witness bond in order to guarantee his presence at court. This fact was made known to the jury. Also, Dixon was granted immunity from prosecution and the jury was properly informed of this fact and an appropriate charge was given by the court to the jury.

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